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No.

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In the Supreme Court of the United States

October Term, 1981

HUSTLER MAGAZINE, INC., AND LARRY C. FLYNT,
Petitioners,

vs.

ROBERT C. GUCCIONE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. In an action for libel based on the publication of a photo-cartoon, may an individual who was found by the appellate court as a matter of law to have no advance knowledge of, or involvement in, the publication of the cartoon, constitutionally be held liable for compensatory and punitive damages to an "all-purpose public figure" merely because the individual sued held the titles of Publisher of the magazine containing the cartoon and Chairman of the Board of Directors of the corporation which owned the magazine?

2. Where the appellate court has held, as a matter of law, that the individual defendant had no knowledge of, or involvement in, the photo-cartoon sued upon before its publication, does a jury charge which states:

> "You may find actual malice to exist if you find the material complained of to be false and 'fabricated' or a 'product of defendant's imagination'"

unconstitutionally permit the defendant to be found liable without fault for punitive and compensatory damages in favor of an "all purpose public figure" plaintiff?

3. Where the photo-cartoon sued upon was one of intended fiction in the form of parody and satire -- which by necessity had to be "false and fabricated or a product of defendants' imagination" -- does a jury charge which states:

> "You may find actual malice to exist if you find the material complained of to be false and 'fabricated' or a 'product of defendants' imagination'"

unconstitutionally permit the defendant to be found liable without fault for punitive and compensatory damages, in favor of an "all purpose public figure" plaintiff?

4. Are the defendants' due process rights to a trial by a fair and impartial fact-finder on the issue of liability denied when an appellate court remands the case for a new trial on the issue of damages alone, although the issues of liability and damages are interwoven, and the appellate court has found as a matter of law that the defendants were denied a fair trial on the issue of damages because of the extreme passion and prejudice of the jury, which: (1) attempted to put the defendants out of the publishing

business; (2) awarded damages in excess of $38,000,000 for a photo-cartoon; and (3) awarded more than 13 times the amount of damages that the trial court found to be reasonable?

PARTIES

Petitioners are Hustler Magazine, Inc., and Larry C. Flynt, who at all pertinent times was publisher of Hustler and chairman of the board of its corporate owner. Respondent is Robert C. Guccione, who at all pertinent times was editor and publisher of Penthouse Magazine and chairman of the board of its corporate owner.

RULE 28.1 STATEMENT

The parent company of Hustler Magazine is L.F.P., Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES. v

INTRODUCTION 1

QUESTIONS PRESENTED 2

PARTIES 5

RULE 28.1 STATEMENT 5

OPINIONS BELOW. 6

JURISDICTION. 6

CONSTITUTIONAL PROVISIONS INVOLVED. . 7

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 19

A. Liability for Libel of a Public Figure Constitutionally Requires Actual Advance Knowledge of, or Involvement in, the allegedly Libelous Publication. 19

B. The Court's Instruction Permitting the Jury to Find "Actual Malice" merely by finding the Material to be "False and Fabricated or a Product of the Defendants' Imagination" was Unconstitutional because it was Without Regard to Whether the Defendants: 1) had prior knowledge or involvement in the allegedly libelous publication; 2) intended the publication to be a statement of fact; and 3) knew of the falsity of the statement or published it without regard to its truth or falsity. 29

C. A Jury Instruction that a Parody or Satire can be Libelous merely because it is "False and Fabricated", or the Product of the Defendant's Imagination" is Unconstitutional. 37

D. Due Process Requires that a New Trial be Granted as to Both Liability and Damages When 1) a New Trial is Granted as to Damages Because the Jury's Award was the Result of Extensive Passion and Prejudice; 2) the Issue of Damages and Liability are Inextricably Intertwined; and 3) Defendant Flynt was Found Liable for Invasion of Privacy in the Absence of Evidence of his Knowledge or Involvement in the Publication, Even Though the Jury was Instructed that Actual Knowledge is an Element of that Tort 44

CONCLUSION. 65

APPENDIX (Printed under separate cover):

Judgment Entry of the Supreme Court of Ohio, sua sponte, dismissing Petitioners' Appeal from the Court of Appeals for Franklin County. A1

Judgment Entry of the Supreme Court of Ohio, dismissing Petitioners' Motion to Certify the Record of the Franklin County Court of Appeals A2

Decision of Franklin County, Ohio Court of Appeals, rendered on October 8, 1981 . . . . . A3

Journal Entry of Judgment by the Franklin County, Ohio Court of Appeals of October 13, 1981 . . . . . A44

Journal Entry of Franklin County, Ohio Court of Appeals of October 15, 1981 . . . . . A44

Judgment Entry of Franklin County, Ohio Court of Common Pleas overruling Petitioners' Motion for A Mistrial, Motion for Judgment N.O.V. and Motion for a New Trial, and remitting damages as against both Petitioners, April 28, 1980. . . . . A46

Decision of Franklin County, Ohio Court of Common Pleas, April 16, 1980 overruling Petitioners' Motions above-stated, and providing remititur, amended in April 28, 1980 Judgment Entry A49

Cover page and itemization of Assignments of Error presented for review in the Franklin County, Ohio Court of Appeals A61

Cover page and itemization of Propositions of Law presented for review by the Ohio Supreme Court. . A67

Cartoon published in April, 1979 issue of Hustler A70

Cartoon published in May, 1979 issue of Hustler A71

Cartoon containing cropped face photograph of Respondent published in June, 1979 issue of Hustler A72

Decision of Franklin County, Ohio Common Pleas Court under which Respondent was declared a public figure for all purposes, November 23, 1979 . . . . . A73

Transcript of Instructions to Jury given by Franklin County, Ohio Common Pleas Court during trial of this action A78

Transcript of counsel's objections to portions of jury instructions given by Franklin County, Ohio Court of Common Pleas A97

Verdicts returned by the jury in the Franklin County, Ohio Common Pleas Court A110

Transcript of testimony of Lee Quarnstrom A118

TABLE OF AUTHORITIES
Cases

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 19 L. Ed. 2d 248, 88 S. Ct. 197 (1967) 29

Brabham v. State of Mississippi, 96 F.2d 210 (5th Cir. 1938) 59

Bridges v. California, 314 U.S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941) . . 40

Camalier & Buckley-Madison, Inc. v. Madison H., Inc., 513 F.2d 407 (D.C. Cir. 1975) 61

Colgrove v. Battin, 413 U.S. 149, 37 L. Ed. 2d 522, 93 S. Ct. 2448 (1973) . . 56

Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) 26,29

Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). 34

Gasoline Products Co. v. Champlin Co., 283 U.S. 494, 75 L. Ed. 1188, 51 S. Ct. 513 (1931). 56,60

Gertz v. Welch, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) 27,28,38,42,62

Herbert v. Lando, 441 U.S. 153, 60 L. Ed. 2d 115, 99 S. Ct. 1635 (1979). . 28

Juliano v. Abeles, 114 N.J.L. 510 (1935) 61

Minneapolis, St. Paul & S.S.M.RY. Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L. Ed. 1243 (1931) 57,58,59

National Surety Co. v. Jean, 61 F.2d 197 (6th Cir. 1932) 59

Penthouse International, Ltd. v. Playboy Enterprises, Inc., (S.D.N.Y., 1980), 86 F.R.D. 396, aff'd 2nd Circuit Court of Appeals (2nd Cir., 1981) ___F.2d___, (decision rendered Oct.28, 1981, Nos. 449 450-451) 50

Richardson v. Communications Workers of America, 530 F.2d 126 (8th Cir. 1976), cert.den. 97 S. Ct. 77 61

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971) 40

St. Amant v. Thompson, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968) 18,29,32,33,34,35,36,37

Time v. Hill, 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967). . . 29,34

United Airlines, Inc. v. Wiener, 286 F.2d 302 (9th Cir. 1961) 61,63

Viereck v. United States, 318 U.S. 236, 87 L. Ed. 734, 63 S. Ct. 561 (1943) . 56

Winters v. New York, 333 U.S. 507, 510, 92 L. Ed. 840, 847, 68 S. Ct. 665 (1947) 40

Yorty v. Chandler, 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970) 42

United States Constitution:

First Amendment 7,28,38

Fourteenth Amendment 7,28,42

Statutes

§51, New York Civil Rights Law. . 11,23

28 U.S.C. §2101(c) 7

Rules

Rule 17.1(a), (b), United States Supreme Court Rules 7

Other Authorities

34 OHIO JUR. 2d, Libel and Slander §156 30

Sack, Robert D., Libel, Slander and Related Problems (1980) 41,42,62

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To the Supreme Court of Ohio

INTRODUCTION

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered in the above case on January 27, 1982, wherein said Court's jurisdiction was

refused with respect to Petitioners' appeal of the October 8, 1981 Decision of the Franklin County, Ohio Court of Appeals, entered on October 13, 1981, and to review the said October 8, 1981 Decision of the lower appellate court.

QUESTIONS PRESENTED

1. In an action for libel based on the publication of a photo-cartoon, may an individual who was found by the appellate court as a matter of law to have no advance knowledge of, or involvement in, the publication of the cartoon, constitutionally be held liable for compensatory and punitive damages to an "all-purpose public figure" merely because the individual sued held the titles of Publisher of the magazine containing the cartoon and Chairman of the Board of Directors of the corporation which owned the magazine?

2. Where the appellate court has held, as a matter of law, that the individual defendant had no knowledge of, or involvement in, the photo-cartoon sued upon before its publication, does a jury charge which states:

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PARTIES

Petitioners are Hustler Magazine, Inc., and Larry C. Flynt, who at all pertinent times was publisher of Hustler and chairman of the board of its corporate owner. Respondent is Robert C. Guccione, who at all pertinent times was editor and publisher of Penthouse Magazine and chairman of the board of its corporate owner.

RULE 28.1 STATEMENT

The parent company of Hustler Magazine is L.F.P., Inc.

OPINIONS BELOW

Petitioners' motion to certify the record was dismissed by the Ohio Supreme Court without public report. The October 8, 1981 Decision of the Court of Appeals of Franklin County, Ohio left standing by the Ohio Supreme Court's refusal to extend jurisdiction over this matter has not as yet been, and may not be, publicly reported. The pertinent Decisions and Entries are included with the Appendix to this Petition at pages A1-A60.

JURISDICTION

The Ohio Supreme Court's sua sponte refusal to grant jurisdiction over Petitioners' appeal was entered herein on January 27, 1982 and this petition for a writ of certiorari was filed within ninety (90) days following entry of that judgment as that time was

extended by this court's order for ten (10) days until May 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §2101(c) and Rule 17.1 (a), (b), United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

A. First Amendment to the United States Constitution. "Congress shall make no law. . .abridging the freedom of speech, or of the press. . ."

B. Fourteenth Amendment to the United States Constitution. ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

This action is based upon publication by Hustler Magazine, Inc. in the June, 1979 issue of Hustler of a

photo-cartoon relating to Robert C. Guccione, owner and publisher of Penthouse Magazine and other similar publications. Hustler had obtained a photograph of Guccione from United Press International for $50 and superimposed the head portion onto the photofigure of another male. That figure was placed behind and next to that of another person suggesting simulated sexual contact with such person. Guccione was shown in the photo-cartoon smiling and holding a jar of Vaseline, and the caption accompanying the photo-cartoon read "Great Moments in Porn No. 3 -- Bob Guccione discovers Vaseline." (See Appendix A72.) The testimony showed that by this publication Hustler was attempting to satirize Bob Guccione's widely publicized statements espousing and discussing open and variant sexual

conduct, and to parody his alleged use of Vaseline on the camera lens in taking his own "soft-focus" photographs of nude models which appeared in the centerfolds of his own Penthouse Magazine. The only witness on this subject was Lee Quarnstrom, "Bits & Pieces" editor of Hustler at the time. He testified (at pages 1691-1694 of the trial transcript), as is quoted on pages A118-120 of the Appendix to this Petition, regarding his intent and that of Hustler to parody and satirize Guccione's open sexual conduct and his "Vaseline lens" techniques by a photo-cartoon of the next logical sexually related use of Vaseline as a lubricant in sexual relations.

The sued upon photo cartoon was one of a series of three similar photo cartoons published in three consecutive issues of Hustler.

In the two immediately previous issues, Hustler had in similar fashion satirized and parodied two other famous publishers of sexually-oriented magazines depicting nudes--namely, Hustler's own publisher, Larry Flynt, and Hugh Hefner, publisher of Playboy Magazine. In the April 1979 issue of Hustler (Defendant's Ex. 306), Great Moments in Porn No. 1 had appeared. This was a photo-cartoon of a cropped head-photo of Larry Flynt on the body of the nude universal man handing to God, in Michaelangelo's "The Creation," a copy of Hustler Magazine. The title read: "Larry Flynt delivers a copy of Hustler to his first subscriber." (See Appendix A70). In the May 1979 issue of Hustler (Defendant's Ex. 307) Great Moments in Porn No. 2 was a photo-cartoon showing a cropped head photo of Hugh Hefner, replete with pipe, in

simulated sexual contact with a rabbit. The title read: "Hugh Hefner fucks his first bunny." (See Appendix A71). This was a parody on Hefner's alleged sexual relations with many of his magazine's models and waitresses who are known as "Bunnies".

Guccione filed suit on six counts against both Petitioners, two of which, based on a 1976 Hustler issue, were dismissed on motion prior to trial, and two more of which, based upon a February, 1979 Hustler publication, were voluntarily dismissed by the plaintiff at the close of his case-in-chief. The two remaining claims against the Petitioners emanated from the same publication, the June 1979 issue of Hustler. These claims were grounded upon libel as defined under Ohio law, and statutory invasion of privacy pursuant to §51, New York Civil

Rights Law (New York being the locus of Guccione's residence).

This action was tried to a jury. At the close of the evidence, arguments and instruction, the jury awarded Robert Guccione approximately $38,000,000.00 in damages against the Petitioners, $1,150,000.00 being "compensatory" damages for which Hustler and Larry C. Flynt personally were to be jointly and severally liable. Compensatory damages were not assessed against either the invasion of privacy or libel claims in a manner such that they could be attributed to either cause of action or either Defendant, as apart from the other. $26,000,000.00 was awarded in punitive damages against Flynt on both claims, although the jury awarded no compensatory or nominal damages against him on the privacy claim. $11,000,000 in punitive damages was assessed against

Hustler on both claims, although the jury failed to award compensatory or nominal damages against the magazine under the claim of libel.

The trial court, on April 16, 1980, filed a Decision overruling Flynt's motion for judgment n.o.v. and both of Defendants' motions for a new trial, on the condition that Guccione accept a remittitur of the punitive damages awarded against Flynt in excess of $2,000,000, and against Hustler in excess of $850,000, leaving the compensatory damage award intact. Shortly thereafter, the trial court revised its aforesaid Decision by journalizing an entry which changed that portion of the Decision relating to the remittitur. As entered, the remittitur reduced the punitive verdict on the invasion of privacy claim against Flynt to one dollar, and

remitted the punitive verdict on the theory of libel as against Hustler to one dollar. The Court left standing against both defendants jointly the compensatory verdict, but assessed the aforementioned $2,000,000 punitive damage verdict against Flynt on the libel claim, and the $850,000 punitive damage verdict against Hustler on the invasion of privacy claim.

Twenty assignments of error were thereafter raised in the Court of Appeals of Franklin County, Ohio; eight of which were found to be well taken in whole or in part. As a result, the appellate court reversed the trial court's remitted judgment, finding that the jury had attempted to put the Petitioners "... out of business by awarding an amount of punitive damages so great that they no longer could continue to publish...", and that since

the jury's awards of punitive damages were intended to destroy the Petitioners "rather than merely punish them for a specific intentionally wrongful and malicious act, the jury [had] acted with undue passion and prejudice." [Appendix at p. A40] However, the appellate court ordered a new trial only as to damages, notwithstanding the court's finding that the

> "...plaintiff was overly successful in his endeavor to appeal to the passion and prejudice of the jury and succeeded in having the jury return a verdict 13 times the amount which the trial court found to be reasonable. The enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice..." [Appendix at p. A41]

Thus, in spite of the extreme passion and prejudice of the jury against the Petitioners, the trial court affirmed the judgments of liabil-

ity against both petitioners, except with respect to the the invasion of privacy claim against Defendant Flynt.

As to the invasion of privacy claim, the Ohio Court of Appeals held that since Petitioner Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon before its publication, he could not be held liable under the invasion of privacy claim. Nevertheless, the Ohio appellate court upheld the libel judgment against Petitioner Flynt even though he had no knowledge of, or involvement in, the photo-cartoon sued upon before publication, solely because Flynt held the position of Publisher and Chairman of the Board of the corporation which owned Hustler Magazine.

On attempted appeal to the Supreme Court of Ohio, Petitioners asserted five propositions of law. Petitioners

contended that neither compensatory nor punitive damages could properly have been assessed against Defendant Flynt individually for the alleged libel of the all-purpose public figure, Robert Guccione, where the Court of Appeals held as a matter of law that the evidence established that Petitioner Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon before it was published.

Petitioners also asserted that the trial court had erroneously left to the jury the question of determining whether the photo-cartoon constituted libel per se in company with a constitutionally impermissible jury charge permitting the assessment of Flynt's liability based upon a determination as to whether or not Flynt was "in control" of the corporation publishing the June, 1979 issue of Hustler; that the verdict,

having been obtained by passion and prejudice of the jury through prejudicial misconduct of Plaintiff's counsel as determined by the appellate court, required reversal of the judgments rendered against both defendants on liability as well as damages; that the jury verdicts were fatally defective as to the punitive damage awards, having been levied in the absence of jury findings of nominal or compensatory damages, and without distinction as to the defendants regarding the compensatory award; and that the trial court, in giving a jury charge suggested by the plaintiff purportedly based upon St. Amant v. Thompson, 390 U.S. 727, 20 L. Ed. 2d 262, 88 S.Ct. 1323 (1968), had unconstitutionally instructed the jury to the effect that the "fictitious" or "fabricated" character of a cartoon was a

constitutionally appropriate substitution for, or adequate means of satisfying, the "actual malice" standard set by this Court as to public-figure plaintiffs.

As noted above, the Supreme Court of Ohio refused jurisdiction over Petitioner's appeal, dismissing it sua sponte.

REASONS FOR GRANTING THE WRIT

A. Liability for Libel of a Public Figure Constitutionally Requires Actual Advance Knowledge of, or Involvement in, the allegedly Libelous Publication.

It can be said without fear of genuine contradiction that the plaintiff, Robert Guccione, had willingly "thrust himself into the vortex" of the widest public controversy concerning open and often aberrant sexual conduct well prior to publication of the June, 1979 issue of Hustler which is the

subject of this Petition. In ruling upon Petitioners' pre-trial motion to declare Guccione's public figure status, the trial court in this action wrote in its Decision of November 23, 1979:

> ". . .Plaintiff Guccione does have a substantial amount of media access, through his own and other publications and through a variety of public appearances, and has a familiarity with the media and the methods of obtaining personal publicity . . .
> Further, Plaintiff Guccione has voluntarily entered the area of discussion and debate on the alleged joys of unfettered sexuality of almost any form accompanied by an unrelenting attack on biblical precepts of sexual morality through his wholly owned publications and other avenues of public expression. His publications also have dealt at length with political controversy. Plaintiff Guccione did not obtain the recognition he has as a result of the alleged defamatory publications in this case. Guccione has widespread business and financial interests which have led to a substantial amount of public notoriety." [Appendix at pp. A75-76]

Accordingly, the trial court held that Robert C. Guccione "is a public figure for all purposes".

Mr. Guccione did not contest his all-purpose public figure status at trial or on appeal, and indeed testified in acceptance of such a legal characterization.

In this context, Plaintiff Guccione should have been required to prove "actual malice" by the standard of "clear and convincing" evidence in order to constitutionally permit a finding of liability against Larry Flynt for libel, especially since the Ohio Court of Appeals held, as a matter of law, that Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon prior to its publication. Instead the Court permitted a jury charge which stated that Larry Flynt could be found to have had "actual malice" merely if the photo-cartoon of which he had no knowledge of, or involvement in, prior to its publica-

tion "was false and fabricated or a product of defendant's imagination."

Although the trial court correctly defined "actual malice" in one portion of its charge to the jury as to libel, it also impermissibly redefined or eviscerated that definition in other portions of the libel charge which permitted a finding of "actual malice" where the photo-cartoon was intended to be fictitious, if such intended fiction was "false or fabricated" or a "product of the defendant's imagination."

In March of 1978, Defendant Larry C. Flynt had been shot and almost killed in Georgia. The evidence presented at trial as to Flynt's personal association with the publication of the June, 1979 issue of Hustler was to the effect that he had been hospitalized for long periods of time shortly prior to that date, had undergone various forms of

drug and other therapy, and, as a paraplegic, was not actively involved in the business of publishing Hustler for the pertinent period.

In holding that the invasion of privacy claim against Flynt should be reversed, the Franklin County, Ohio Court of Appeals noted that §51, N.Y.C.R.L., authorizes an award of punitive damages only "if the defendant shall have knowingly used such person's name, portrait or picture." (Emphasis added.) The Ohio Court of Appeals rejected Petitioners' assertion that the plaintiff was required to prove Flynt's knowing, unauthorized use of Guccione's photo by the standard of "clear and convincing" evidence, but nevertheless held that:

> "A review of the record reveals no evidence whatsoever supporting the invasion-of-privacy claim as against defendant Flynt. . .

Although defendants incorrectly indicate that plaintiff's burden of proof is by clear and convincing evidence, nevertheless, plaintiff provided no evidence from which it could be inferred that defendant Flynt had any connection with the June 1979 publication other than as publisher of Hustler. There is no evidence of direct involvement with respect to this particular publication, either by use of plaintiff's name or the obtaining of the photograph and use thereof, although there was evidence that three years previously defendant Flynt had considerable direct involvement with respect to the May 1976 issue of Hustler. In the meantime, defendant Flynt had been injured by an assassin's bullet, and, according to his testimony, had never resumed the same type of direct involvement in publication of Hustler as he had previously. Even if the trier of the fact does not believe Flynt, at best, the evidence is then in equipoise. Construing the evidence most strongly in favor of plaintiff, reasonable minds could only conclude that defendant Flynt was not personally responsible for any invasion of plaintiff's privacy in violation of the New York statute that may have been committed by Hustler, Inc. His position as publisher and chairman of the board of Hustler does not make him responsible for an invasion of privacy in violation of the New York Statute of which he has no personal involvement." (Emphasis added.) [Appendix at pp. A22-23]

Notwithstanding the Ohio Court of Appeals reversal on the invasion of privacy claim against Flynt on the ground that he had no connection with, or involvement in, the publication of the photo-cartoon sued upon, the Court went on to uphold the libel judgment against Flynt based on the same photo-cartoon stating:

> "On the other hand, defendant Flynt's position as the publisher and chairman of the board of Hustler makes him individually liable for a libel printed in Hustler, even if he had no actual knowledge of the libel prior to its publication..." (Emphasis added). [Appendix at pp. A22-23]

Thus, the Ohio appellate court held that Flynt was liable for "publication" of an allegedly libelous photo-cartoon of the public figure Guccione, even though the appellate court had held, as a matter of law, that Flynt had no actual knowledge of, or involvement in, the publication of the photo-cartoon--

let alone the constitutionally required actual malice, proven by clear and convincing evidence. In short, Flynt was liable for the photo-cartoon without fault!

Petitioners submit that a line of cases, commencing with Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967), logically compel a finding that Larry Flynt could not constitutionally have been held to be liable upon Guccione's libel claim in view of the Ohio appellate court's contemporaneous determination that, as a matter of law, the evidence failed to prove that Flynt even had prior knowledge of the photo-cartoon sued upon by a "preponderance" standard, let alone "actual malice" proven by a standard of "clear and convincing" evidence.

Although Guccione sought, and was also refused, the jurisdiction of the Ohio Supreme Court upon appeal, he did not allege the existence of a constitutional issue, and the lower appellate court's determination of the facts related above as to Petitioner Flynt are now final. While many of the cases decided by this Honorable Court have involved only defamation claims against a publishing company and not against an individual such as Flynt; there are, of course, benchmark decisions issued by this Court in which application of the "actual malice" standard of proof was held to be necessary in determining the liability of the individual responsible for publication of an article or broadcast, such as Flynt, without material distinction from those cases in which only the magazine, newspaper or radio station was sued. See, e.g., Gertz v.

Welch, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); Herbert v. Lando, 441 U.S. 153, 60 L. Ed. 2d 115, 99 S. Ct. 1635.

Petitioners submit that violations of the First and Fourteenth Amendments to the United States Constitution resulted from the trial court's submission of Guccione's libel claims against Larry Flynt to the jury under a charge which focused, over objection, upon Flynt's "control" over the publication of Hustler in the abstract, and which permitted a finding of liability without fault, in the absence of adequate proof that he had knowledge of the existence of the photo-cartoon sued upon before publication; much less knowledge of the "falsity" of the satirical photo-cartoon in question, or even a high degree of awareness of the probability of such "falsity". Gertz v. Welch, supra;

Curtis Publishing Co. v. Butts, supra; St. Amant v. Thompson, supra; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 19 L. Ed. 2d 248, 88 S. Ct. 197 (1967).

Likewise, the same constitutional guarantees of freedom of the press and of speech were violated through the trial court's refusal to instruct the jury as requested by Petitioners that liability of Hustler under the New York statute for invasion of privacy could be found only upon a showing of "actual malice". See Time v. Hill, 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967).

B. The Court's Instruction Permitting the Jury to Find "Actual Malice" merely by finding the Material to be "False and Fabricated or a Product of the Defendants' Imagination" was Unconstitutional because it was Without Regard to Whether the Defendants: 1) had prior knowledge or involvement in the allegedly libelous publication; 2) intended the publication to be a statement of fact; and 3) knew of the falsity of the statement or published it without regard to its truth or falsity.

In his charge to the jury the trial court pronounced the following instruction of law:

> "If you find Plaintiff's Exhibit A is libel per se, then a presumption arises as to damage to reputation."

Thereafter followed additional instructions which inescapably led to the understanding that the court had left to the jury the question of determining whether or not a per se libel had been published about the plaintiff.

As 34 Ohio Jur. 2d, Libel and Slander correctly reads, in §156:

> "The rule is well settled in Ohio that where the words of a publication are not ambiguous or uncertain as to their definition, it is the sole function of the court to determine whether such words constitute libel per se, and it is error to leave such a question to a jury."

While this particular, clearly erroneous jury instruction was not in and of itself given to the detriment of the defendants, it became clear in the

remainder of the charge that the jury had been left to speculate that if they merely found that the June, 1979 Hustler photograph depicted Guccione in a "fictitious," or "fabricated" sexual act which was the "product of the Defendant's imagination", they were entitled to award compensatory damages against Flynt, and to entirely misapply the constitutionally required "actual malice" standard of proof by substituting the words "fabrication" and "product of imagination" for proof of Flynt's actual knowledge of both the existence of the photo-cartoon and its "falsity" (despite the conflicting appearance elsewhere in the charge of a proper definition of "actual malice").

The court's actual charge in error reads:

> "You may find actual malice to exist if you find the material complained of to be false, and

fabricated, or a product of the Defendant's imagination." [Appendix at p. A91]

Objections were interposed by defense counsel to this aspect of the charge, for this portion of the instructions was based on a serious misreading of St. Amant v. Thompson, supra, upon which Guccione's counsel had insisted. The Court's charge pursuant to St. Amant would have been proper as to Flynt, only if it had been proven that Petitioner Flynt not only knew about the existence of the photo-cartoon prior to its publication, but that in addition Flynt had serious doubts about the truthfulness of the photo-cartoon. As set forth previously the Court of Appeals held, as a matter of law, that Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon prior to its publication. In St. Amant v. Thompson, supra, the terms "fabrica-

tion" and "product of imagination" were discussed by this Court in the following context only:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation.
> Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." [St. Amant, supra, p. 732]

The trial court's charge so obviously conflicts with the constitutional requirements that Defendant Flynt not only knew about the photo-cartoon sued upon prior to its publication, but that he also entertained serious doubts as

to its truthfulness, that one might conclude that the trial court had accepted the plaintiff's proffered instruction without carefully reading St. Amant v. Thompson, wherein it is stated:

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." [St. Amant, supra, p. 731]

See also Time v. Hill, supra (calculated falsehoods); and Garrison v. Louisiana (1964), 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (knowingly and deliberately published lie.)

Moreover, the very paragraph in which the words "fabrication" and "product of his imagination" appear in the St. Amant opinion above begins with the given fact that the defendant in that case had been personally aware of the publication complained of before it

was published. At trial he was contending only that he had believed the published language to have been true at the time of publication.

In the case at bar, an insight into the trial court's misconception of the significance of the "actual malice" standard under St. Amant v. Thompson is provided in his April 16, 1980 post-trial Decision, whereunder the court refused to render judgment in Flynt's favor, n.o.v. The trial court left $1,150,000 in "compensatory" damages and $2,000,000 in punitive standing under the libel claim, on remittitur, against Larry Flynt personally, stating:

> "Thus, we are left with an allowance of a proper amount with respect to the respective Defendants on the libel count. Mr. Flynt was plainly the architect of the pattern of malice. Hustler Magazine was merely the vehicle for striking the final blow. Thus, Mr. Flynt bears more culpability for the malicious and unprovoked attack on Plaintiff." [April 6, 1980 Decision, p. 10]

(Emphasis added) [Appendix at p. A48]

In other words, the trial court erroneously concluded that the mere fact that Petitioner Flynt held the titles of publisher of Hustler and chairman of the board of its corporate owner is equivalent to having both actual knowledge of the photo-cartoon sued upon before its publication and serious doubts about the truthfulness of the photo-cartoon. Therefore, the trial court erroneously concluded that (1) "actual malice" could be found under St. Amant merely if the photo-cartoon were false and "fabricated" or a "product of defendants' imagination", and (2) general ill will and spite could also be found merely because of the above titles held by Flynt.

Thus, since the Ohio appellate court held as a matter of law that

Larry Flynt had no knowledge of, or involvement in, the photo-cartoon sued upon before its publication, the St. Amant instruction herein unconstitutionally permitted a judgment of liability and damages in favor of an all-purpose public figure without any showing of fault whatsoever on behalf of Petitioner Flynt.

C. A Jury Instruction that a Parody or Satire can be Libelous merely because it is "False and Fabricated", or the Product of the Defendant's Imagination" is Unconstitutional.

In the context of the intended fiction in the form of parody or satire aimed at an all-purpose public figure, the same instruction to the jury (which is the subject of the Second Question Presented) inescapably led the jury to improperly focus upon only the non-factual character of the photo-cartoon sued upon; without proper regard to the

inherent character of parody or satire, which of necessity has to be "false", "fabricated", or "a product of Defendant's imagination."

As this Court aptly wrote in Gertz v. Welch, supra:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (418 U.S. 339, 41 L.Ed. 2d at 805)...
>
> More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." (418 U.S. at 345; 41 L. Ed. 2d at 808)

The photo-cartoon in question, although it may be inappropriate and

offensive if appearing in other media and if concerning persons other than Bob Guccione, was nevertheless a fair satirization of Guccione's open sexual conduct and his "Vaseline lens," or soft-focus photographic techniques. (See testimony of Lee Quarnstrum referenced hereinafter.)

As shown above in the discussion of the Second Question Presented, the only witness on the subject of the intended parody and satire testified that his intent and that of Hustler Magazine was to parody and satirize Guccione's open sexual conduct and his "Vaseline lens" techniques by a photo-cartoon depicting the next logical sexually related use of Vaseline as a lubricant in sexual relations. As such, it constituted an "uninhibited, robust and wide-open" expression of an issue legitimately before the readers served by both Larry Flynt's

Hustler Magazine and Bob Guccione's Penthouse. See Rosenbloom v. Metro media, Inc., 403 U.S. 29, 29 L. Ed, 2d 296, 91 S. Ct. 1811 (1971). And as this Court has held,

> "The line between the informing and the entertaining is too elusive for protection of . . . (freedom of the press)." Winters v. New York, 333 U.S. 507, 510, 92 L. Ed. 840, 847, 68 S. Ct. 665 . . .

And,

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." [Bridges v. California, 314 U.S. 252, 269, 86 L. Ed. 192, 206, 62 S. Ct. 190]

Where the subject is intended to be a treatment of a matter of legitimate public interest (matters of taste aside), this Court has held that the defamation plaintiff should not recover against the defendant without satisfying an "actual malice" standard of proof, even where the plaintiff himself

is not a "public figure" or "public official."

Without further definition of "fabrication" and "product of imagination" the jury was improperly left with the opportunity to erroneously conclude that the intended fictional treatment of matters of public interest in the form of parody and satire can result in liability under the "actual malice" standard merely because the parody or satire was "fabricated" or a "product of the defendant's imagination". Or as stated by Robert D. Sack in his well-known treatise Libel, Slander and Related Problems (1980) at 246:

> "If, indeed, the work is meant to be commentary on a public figure, then it should be protected as opinion, either under constitutional or common law. Although it appears in the guise of statements of fact, it is clearly meant to be a statement of personal opinion, and such personal opinion can neither be true nor false nor libelous. Thus, if someone wishes to convey

> the notion that a particular American president is ineffective, he should not be limited to expressing that view by saying it in so many words. He should be permitted to convey the view more dramatically through the use of admittedly invented verbal images." (Emphasis added)

See Yorty v. Chandler, 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970).

"Fabrication" for the purpose of intended parody and satire of the photo-cartoon at issue here simply does not "make substantial danger to reputation apparent" as to Bob Guccione, within the meaning of Gertz v. Welch, supra at 418 U.S. 348, 41 L. Ed. 2d at 810. Permitting the jury to find liability under such an instruction, and in consideration of the evidence presented in this case, was to impose liability without fault contrary to the First and Fourteenth Amendments.

The Court's error was even further compounded by its failure to permit

Petitioners to present expert testimony on parody and satire. [Appendix at p. A24]

Indeed, the decision of the Ohio Court of Appeals decision requires the Defendant, not the Plaintiff, to prove that in a case of intended fiction as parody or satire that it is manifestly clear from the language employed and pictures used that they could in no way be regarded as defamatory. Or in the words of the Ohio Court of Appeals in this case:

> "The defense that what would otherwise be libelous was satire or spoken in jest is available only if the defendants prove that it is manifestly clear from the language employed and pictures used that together they could in no respect be regarded as an attack upon the reputation or business of the person named or depicted." (Emphasis added.) [Appendix at p. A24]

The effect of the above rule of law is to not only eliminate the constitutional requirement of actual malice

proven by clear and convincing evidence, but in effect to shift that burden to the Defendant!

If the jury charge challenged in this and the preceding question presented passes constitutional muster, and is to become the standard, then parody and satire will no longer be possible as a permitted form of expression.

D. Due Process Requires that a New Trial be Granted as to Both Liability and Damages When 1) a New Trial is Granted as to Damages Because the Jury's Award was the Result of Extensive Passion and Prejudice; 2) the Issue of Damages and Liability are Inextricably Intertwined; and 3) Defendant Flynt was Found Liable for Invasion of Privacy in the Absence of Evidence of his Knowledge or Involvement in the Publication, Even Though the Jury was Instructed that Actual Knowledge is an Element of that Tort

The record in this case clearly establishes prejudicial misconduct on the par. of Mr. Guccione's New York co-counsel Norman Roy Grutman. This

misconduct by Mr. Grutman commenced as abuse of the discovery process, continued throughout the trial and culminated in an improper and successful appeal to the prejudice and passion of the jury during Mr. Grutman's closing argument. Mr. Grutman's misconduct during the trial which prejudicially interfered with the ability of the trial court to control the trial proceedings was the subject of Assignment of Error No. 6 by Petitioners to the Court of Appeals. The highly improper and prejudicial closing argument given by Mr. Grutman elicited a Motion for Mistrial on the part of Petitioners immediately following the close of Mr. Grutman's argument.

Although the Franklin County Court of Appeals found that the "verdict of the jury was one influenced by passion and prejudice" and that a new trial was

therefore necessary as to damages, the Court of Appeals refused to order a full remand for a new trial on both damages and liability.

In the instant case, highly prejudicial misconduct on the part of Mr. Grutman is found, inter alia, in his direct appeal to the passions and prejudices of the jurors in his closing "argument", which reads, in part:

> "Robert Guccione is here, as I will tell you in a moment, not just for himself, he is here for all of us. He is here for himself. He is here for Jackie Kennedy Onassis, for Betty White, for all of the persons upon whom Larry Flynt would heap his calumnies, his abuse, his insults, and his gratuitous falsehoods, and if there is no protection, if there is no vindication for Robert Guccione, then there is no protection for anyone. If this is a society that has become so ripened with selfishness that its members can think only of themselves and not have an interest in our neighbors or our brothers, then this sadly is a society in a state of disillusion that no court and no law can save. But I do not think that, nor does my client think that.

As I say, we have come to Ohio to the crossroads, to the gate way of middle America. We have come to the state that has produced eight United States Presidents, three Chief Justices of the Supreme Court of the United States, thirty-five cabinet officers, and one Larry Flynt, and we are going to say to Larry Flynt with your verdict, "Goodbye Columbus."

This is a case where I will ask you on the evidence to send the message and to express outrage and the indignation that properly belongs against a man who is, as I say is a liar, and I say a man who is a fraud-strong word . . .

If you award a verdict against Larry Flynt several hundred thousand dollars above the several hundred thousand dollars of lawyers' fees already expended to make Mr. Guccione whole, do not think that would stop Larry Flynt, a man who has a cash flow that he admits that is more than a million and a half dollars a week? Now, these are sums, I know, astronomical, and outside of the experience of almost all of you, all of us, but that is the reality of the bloated Larry Flynt, a man heaped upon on his own ill-gotten success. A modest verdict, he will rear back and roar at you, and will have gotten away with it, and what will happen next month or the next month after to Mr. Guccione, to his mother, to Ms. Keeton, to his children, to President Carter?

(Mr. Brownfield): Object.

(Mr. Grutman): To anyone whom he may elect to vent his spiteful vicious ire upon. That is the focus. How do you stop that man? How do you stop him? I have calculated from the figures which the Flynt organization provided to us that of the magazines which are involved in the publications of the specific evils against Mr. Guccione, Mr. Flynt probably made over ten million dollars, and I could ask you rationally, as a matter of punitive damages, to stop Mr. Flynt by making him pay back the money that he made on this vile pile of swill.

(Mr. Brownfield): Object." [Trial Trans., pp. 1897, 1916-1917 (Emphasis added)] [Appendix at pp. A38-39]

The record accurately discloses just how far beyond proper advocacy Mr. Grutman traveled in his argument. Defendants moved for a mistrial immediately following Mr. Grutman's closing argument.

This blatant appeal to the passion and prejudice of the jury in argument and in the presentation of "evidence"

was demonstrated by the $38,000,000.00 jury verdicts, and was recognized by the Franklin County, Ohio Court of Appeals in the following words:

> "Many of these appeals to the passion and prejudice of the jury have been discussed in connection with other assignments of error. In addition, a portion of the closing argument of plaintiff's counsel clearly reveals an appeal to passion and prejudice. (Tr. 1915-1916). [Decision of Court of Appeals, p. 3121 (Emphasis added)]
>
> However, under the circumstances of this case, plaintiff was overly successful in his endeavor to appeal to passion and prejudice of the jury and succeeded in having the jury return a verdict 13 times the amount which the trial court felt was reasonable. This enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice, and, accordingly, a new trial must be ordered upon the issue of damages." [Decision of Court of Appeals, p.3123 (Emphasis added)] [Appendix at pp. A38, A41]

The law in Ohio should have required a reversal of the judgment as to liabil-

ity as well as damages.

> "Where the factual questions being considered by a jury are in near equipoise, improper argument of counsel should be closely scrutinized, and where the damages awarded are excessive and appear to have been given under the influence of passion and prejudice, the resulting prejudice cannot be corrected by remittitur; the only recourse is the granting of a new trial." (Citing case) [Book v. Erskine & Sons, Inc., 154 Ohio St. 391 (1952) (Syl. #2)]

> "The conduct of plaintiff's counsel was reprehensible and inexcusable, and, unprovoked as it was, constituted reversible error regardless of the lack of objection." [Jones v. Macedonia-North Field Banking Co. (1937) 132 Ohio St. 341, 351]

See also Penthouse International, Ltd. v. Playboy Enterprises, Inc., (S.D. N.Y., 1980), 86 F.R.D., 396, aff'd 2nd Circuit Court of Appeals (2nd Cir., 1981)____F.2d____, decision rendered October 28, 1981, Nos. 449, 450-451.

Likewise, in direct examination of his client, Guccione's counsel engaged in the following sort of questioning,

which elicited these answers:

"(Mr. Guccione): No, I couldn't say that I have lost any business.

(Mr. Sturtz): Object to that, Your Honor.

(The Court): I think we should give the precise stipulation to the Jury.

(Mr. Grutman): I'll stipulate, Your Honor, that no claim is being made in this lawsuit to recover any damages for business lost by Mr. Guccione.

(The Court): Okay.

(Mr. Grutman): I'm inquiring, specifically, Mr. Guccione, about how you felt emotionally, what concerns you had and try to explain that the best way you can for the ladies and gentlement of the jury and for Judge Wright.

(Mr. Guccione): I was very much aware of my public figure status, and since this was one link in a long chain of similar experiences with Hustler Magazine, I worried very much what the next step would be. Would it be a picture of my daughter, who was then 18 years old, would it be my mother appearing in the centerfold. All of this was possible as it had already been demonstrated to us.

As a public figure, I felt there may be an argument as to how much

privacy I was entitled to as an individual. But what concerned me most profoundly at the time was to what extent was the privacy of my mother, my father-
(Mr. Sturtz): Objection, Your Honor.
(Mr. Guccione): --my children, my friends and my colleagues, the people I work with, the woman I love.
(The Court): Just a moment.
(Mr. Guccione): To what extent was their privacy, also surrendered.
(The Court): Just a moment. There has been an objection lodged. Grounds for your objection?
(Mr. Sturtz): They are not public figures, they are not before the Court, they are not plaintiffs.
(The Court): Of course they are not. However, I think the witness is entitled to go into his thought process. And you may continue. I think you are correct but with that limiting statement you are dealing only with Mr. Guccione's thought processes at the time.
(Mr. Grutman): You were saying, Mr. Guccione, you were concerned what would be the next step that Mr. Flynt would take?
(Mr. Guccione): Yes, very much so." [Trial Trans., pp. 545-547 (emphasis added)] [Appendix at p. A11-12]

This testimony was a gross and gratuitous irrelevance. The obvious and sole purpose of which was to add fuel to the flames of prejudice which were nurtured by the plaintiff throughout

this trial, as the Court of Appeals later held. An elementary legal premise is that the plaintiff's mental suffering, which was what his whole claim for compensatory damage amounts to, is recoverable only for the publication upon which suit is brought.

By the above testimony, Plaintiff based his claim for damages on a publication which not only was not the one sued upon, it was one which existed only in his imagination and was not even about him. In so doing, he cleverly chose the most inflammatory version he could imagine.

A second well-established legal premise is that a plaintiff cannot recover for damages to the reputation or feelings of persons other than himself. If he suffers mentally because of the suffering he sees to a member of his family, his own suffering is an

element of recoverable damages, but the damage to the other is not. Necessarily subsumed in this premise is the premise that the publication must be about the plaintiff.

The Court of Appeals agreed with this characterization of the above-quoted testimony in setting aside the damage awards; but, in violation of Defendants' due process rights, left an unfair and partial jury's determination of liability intact based, in goodly part, upon the same evidence.

In other words, the extreme prejudice and passion which led the jury to attempt to put the petitioners "out of business by awarding an amount of punitive damages so great that they no longer could continue to publish" infected, tainted and poisoned the jury's verdict against petitioners on the issue of liability, as well as

damages, in violation of Petitioners' due process rights to a jury trial by a fair and impartial jury. One of the clearest indications of the fact that the extreme prejudice and passion of the jury infected, tainted and poisoned the verdict of liability, as well as damages, is that the jury found that Flynt was liable for damages for libel and invasion of privacy, even though the appellate court held, as a matter of law, that he had no actual knowledge of, or involvement in, the publication of the photo-cartoon sued upon. The appellate court summarized the extreme nature of the jury's passion and prejudice as follows:

> "... the jury return[ed] a verdict 13 times the amount which the trial court found to be reasonable. [The] enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was influenced by passion and preju-

dice." [Appendix at p. A41]

This Court has held that in both criminal and civil cases, the purpose of the right to trial by jury is "to assure a fair and equitable resolution of factual issues." Gasoline Products Co. v. Champlin Co., 283 U.S. 494, 498, 75 L. Ed. 1188, 51 S.Ct. 513 (1931); Colgrove v. Battin, 413 U.S. 149, 157, 37 L. Ed. 2d 522, 529, 93 S. Ct. 2448 (1973); cf. Viereck v. United States, 318 U.S. 236, 87 L. Ed. 734, 741, 63 S. Ct. 561 (1943).

There are two separate independent reasons why the Ohio Court of Appeals unconstitutionally deprived petitioners of due process when they ordered a new trial only on the issue of damages after having found that (1) the jury's $38,000,000.00 verdict for the photo-cartoon "was more than thirteen times what a reasonable jury would have

found," (2) "the grossly excessive verdict was influenced by passion and prejudices", and (3) that there was "no evidence from which it could be inferred that defendant Flynt had any connection..." with the publication of the issue of Hustler which contained the photo-cartoon.

First, it is respectfully submitted that due process clearly requires that Petitioners were entitled to receive a jury's verdict untainted by bias, prejudice or passion on the issue of liability as well as damages. Many federal and state cases have held that a verdict cannot be permitted to stand when it is found to be in any degree the result of appeals to passion and prejudice. In Minneapolis, St. Paul and S.S.M.Ry Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243 (1931), this Court reversed a trial court's

judgment which had been entered after the trial court had found a jury's award of damages to be excessive, but had accepted a remittitur. As the Court noted:

> "obviously such means (appeals to passion and prejudice) may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant getting a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon its opponent." 283 U.S. at 521-522.

However, in the instant case there is compelling evidence that the tainted and grossly excessive $38,000,000 jury verdict on damages caused by extreme passion and prejudice actually infected and poisoned the verdict of liability. As noted previously, the jury awarded very substantial damages against Petitioner Flynt for invasion of privacy and libel, even though the Ohio appellate

court found as a matter of law that no reasonable jury could have concluded that Flynt had any knowledge of, or involvement in, the photo-cartoon sued upon.

Although this Court did not explicitly mention due process in Minneapolis, St. Paul and S.S.M.Ry Co., supra, the underlying rationale of its holding is obviously a due process concern. Several federal court of appeals cases have followed this case and, when they have found that an excessive verdict was a result of passion, prejudice or caprice, have denied the power of the Court simply to accept a remittitur. See, e.g. National Surety Co. v. Jean, 61 F.2d 197 (6th Cir. 1932); Brabham v. State of Mississippi, 96 F.2d 210 (5th Cir. 1938). By ordering a new trial on the issue of damages alone, the Ohio appellate court, in effect, unconstitu-

tionally ordered a remittitur, when they should have reversed the entire verdict.

The second reason why the due process clause requires that the jury's verdict of liability be set aside, in addition to the grossly excessive damage verdict caused by extreme passion and prejudice, is that in this case the issue of damages is so closely connected to the issue of liability that the jury could not fairly and impartially examine the issue of damages alone without also considering the question of liability. As this court stated in Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 75 L.Ed. 1188, 51 S. Ct. 513, 515 (1930),

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. (citations omitted) Here the question of damages on the counterclaim

> is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."

See also United Airlines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir. 1961); Camalier & Buckley-Madison, Inc. v. Madison H., Inc., 513 F. 2d 407, 420-421 (D.C. Cir. 1975); Richardson v. Communications Workers of America, 530 F. 2d 126, 130 (8th Cir. 1976); cert. den. 97 S. Ct. 77; Juliano v. Abeles, 114 N.J.L. 510, 512-513 (1935).

In the instant case the inseparability of the question of liability from that of damages goes to the very heart of the photo-cartoon sued upon. The jury was obviously so inflamed by passion and prejudice that they could not fairly evaluate the Petitioner's contention on the issue of liability that the photo-cartoon sued upon was

intended to be, and was, constitutionally protected opinion in the form of parody and satire. On the issue of damages, the same contention of the Petitioner's intent in publishing the photo-cartoon necessarily exists: namely, whether the Petitioners in fact intended to publish a parody and satire on the plaintiff, or whether they instead intended to publish the photo-cartoon as a serious assertion of fact because of their alleged spite or ill will against plaintiff.

As stated by Sacks, supra, at 241

> "Under New York Times and Gertz, the focus should be on subjective awareness of the defendant with respect to the manner in which he believes his humorous communication will be understood. If he thinks he is conveying an idea or a joke, he should be protected; if he knows or believes he will be understood to be conveying a statement of fact that he knows or believes is false, he should not be protected." (Emphasis added.)

In short, the issue of Petitioner's intent in publishing the photo-cartoon is the same on the issue of liability and on the issue of punitive damages; the two issues are interwoven. As the Court noted in United Airlines, Inc. v. Wiener, supra, 286 F.2d at 306, when a party seeks punitive damages, the questions of willfulness and wantonness require an explanation of the facts surrounding the lawsuit, and the question of damages is interwoven with that of liability.

Moreover, since Plaintiff is an all-purpose public figure, the issue of liability constitutionally requires the proving of "actual malice". Therefore, the same issue of Petitioner's intent in publishing the photo-cartoon exists in proving both actual and punitive damages and in proving liability (i.e., whether the photo-cartoon was published

with reckless disregard for its truth or falsity, or whether it was published as intended fiction in the form of parody and satire).

In the instant case the combination of (1) a grossly excessive jury verdict of $38,000,000 (or more than thirteen (13) times a reasonable verdict) resulting from extreme passion and prejudice, and (2) the issues of liability and damages which are necessarily the same and/or intertwined, constitutionally compels, pursuant to due process, a new trial for Petitioners on the issue of liability as well as damages--especially where the grossly excessive and tainted damage verdict resulted in Petitioner Flynt being held liable for substantial damages for a photo-cartoon of which the appellate court held, as a matter of law, that he had no knowledge of, or involvement in, before it was

published.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari issue to review the decision entered in the Franklin County, Ohio Court of Appeals and the Ohio Supreme Court's dismissal of Petitioners' motion for that Court to accept jurisdiction over the merits of Petitioners' appeal.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1981

HUSTLER MAGAZINE, INC., AND LARRY C. FLYNT,
Petitioners,

vs.

ROBERT C. GUCCIONE,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio

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TABLE OF CONTENTS

Judgment Entry of the Supreme Court of Ohio, *sua sponte*, dismissing Petitioners' Appeal from the Court of Appeals for Franklin County A1

Judgment Entry of the Supreme Court of Ohio, dismissing Petitioners' Motion to Certify the Record of the Franklin County Court of Appeals A2

Decision of Franklin County, Ohio Court of Appeals, rendered on October 8, 1981 ..... A3

Journal Entry of Judgment by the Franklin County, Ohio Court of Appeals of October 13, 1981 ..... A44

Journal Entry of Franklin County, Ohio Court of Appeals of October 15, 1981 ..... A45

Judgment Entry of Franklin County, Ohio Court of Common Pleas overruling Petitioners' Motion for a Mistrial, Motion for Judgment N.O.V. and Motion for a New Trial, and remitting damages as against both Petitioners, April 28, 1980 ..... A46

Decision of Franklin County, Ohio Court of Common Pleas, April 16, 1980 overruling Petitioners' Motions above-stated, and providing remittitur, amended in April 28, 1980 Judgment Entry A49

Cover page and itemization of Assignments of Error presented for review in the Franklin County, Ohio Court of Appeals A61

Cover page and itemization of Propositions of Law presented for review by the Ohio Supreme Court .. A67

Cartoon published in April, 1979 issue of *Hustler* A70

Cartoon published in May, 1979 issue of *Hustler* A71

Cartoon containing cropped face photograph of Respondent published in June, 1979 issue of *Hustler* A72

Decision of Franklin County, Ohio Common Pleas Court under which Respondent was declared a public figure for all purposes, November 23, 1979 ..... A73

Transcript of Instructions to Jury given by Franklin County, Ohio Common Pleas Court during trial of this action A78

Transcript of counsel's objections to portions of jury instructions given by Franklin County, Ohio Court of Common Pleas A97

Verdicts returned by the jury in the Franklin County, Ohio Common Pleas Court A110

Transcript of testimony of Lee Quarnstrom A118

APPENDIX

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated January 27, 1982)

No. 81-1840

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

ROBERT C. GUCCIONE,
Appellee,

vs.

HUSTLER MAGAZINE, INC., *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO DISMISSING MOTION TO CERTIFY

(Dated January 27, 1982)

No. 81-1840

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

ROBERT C. GUCCIONE,
Appellee,

VS.

HUSTLER MAGAZINE, INC., *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

DECISION OF THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

(Rendered October 8, 1981)

No. 80AP-375

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE,
Plaintiff-Appellee,

v.

HUSTLER MAGAZINE, INC., *et al.*,
Defendants-Appellants.

WHITESIDE, J.

Defendants appeal from a judgment of the Franklin County Court of Common Pleas and raise twenty assignments of error, as follows:

"1. Plaintiff was erroneously permitted to testify that he feared future publications featuring other members of his family.

"2. The trial court committed error in permitting plaintiff to read to the jury the transcript of deposition of the defendant Flynt as upon cross-examination only, and in letting be read clearly irrelevant and highly prejudicial and inflammatory portions thereof.

"3. The trial court committed plain error in excluding objective evidence sought and/or obtained upon cross-examination of the plaintiff, and exhibits

offered by the defendants which established substantive defenses to the plaintiff's claims, and demonstrated a diminution or total absence of damage to the plaintiff or entitlement to a punitive award.

"4. The trial court erred in admitting highly prejudicial and irrelevant evidence related to defendant Larry Flynt's alleged character.

"5. The trial court erred in permitting the plaintiff's testimony concerning the alleged injury to his son Nicholas to go to the jury on the basis that such testimony was highly inflammatory, emotional and prejudicial; was in direct conflict with the plaintiff's deposition testimony, and was based in part on evidence to which the defendant had been denied access by the trial court.

"6. Misconduct of plaintiff's co-counsel throughout the trial prejudiced the jury, prejudicially interfered with the ability of the court to control the proceedings, and denied defendants their constitutional right of cross-examination.

"7. The verdicts of the jury rendered against defendant Flynt in libel and statutory invasion of privacy are contrary to the manifest weight of the evidence.

"8. The trial court abused its discretion when it refused to allow the defendants to present expert testimony on the topics of humor and satire.

"9. The trial court erred in overruling defendant Flynt's motions to dismiss made in open court at the close of plaintiff's case-in-chief and at the close of trial.

"10. The trial court erred in refusing to grant defendant's motion for mistrial made at closing argument of plaintiff's counsel.

"11. The trial court erred in directing a verdict against Hustler for violation of Section 51, N.Y.C.R.L. and in permitting an award to be based upon proof of alleged damage other than 'publicity value.'

"12. The trial court erred in submitting to the jury the question of determining whether or not the publication at issue constituted libel *per se*, and then defining 'actual malice' as publishing falsely, 'fabricated' material which was the 'product of the defendant's imagination.'

"13. The trial court erred in instructing the jury that defendant Flynt could be found personally liable in damages to the plaintiff under the theory of invasion of privacy merely upon alleged evidence that he had 'resumed control' of Hustler Magazine, Inc., following his near-fatal shooting, before publication of the June, 1979, issue of *Hustler*.

"14. The trial court erred in refusing to charge the jury that evidence of allegedly defamatory statements other than those actually sued upon, is not admissible to aggravate or enhance damages, contrary to the written request to court for charge to jury filed by the defendants.

"15. The trial court erred in permitting the jury to award the plaintiff attorney fees based upon *insufficient and improper evidence*.

"16. The failure of the trial court to give cautionary instructions or a charge to the jury with respect to the weight of the Flynt deposition and his live testimony on cross-examination constitutes reversible error.

"17. The jury verdicts were fatally inconsistent and defective.

"18. The trial court erred in denying a new trial on defendants' post-trial motions based on the verdicts of an impassioned and prejudiced jury while remitting a $26,000,000 punitive veridict against Larry Flynt to $2,000,000 and an $11,000,000 punitive verdict against Hustler, Inc. to $850,000.

"19. The trial court erred when it overruled defendant's motions for new trial, mistrial and judgment N.O.V.

"20. It was an abuse of discretion for the court prior to trial to rule that no further continuances of trial would be granted for the reason of the ill health of defendant Larry Flynt, which resulted in material prejudice to his defense."

At the outset, there are two procedural matters raised by plaintiff. First, plaintiff has filed a motion to dismiss the appeal, or alternatively to strike defendants-appellants' brief or portions thereof, upon the ground that matters outside the record on appeal are mentioned. We find no merit to that motion. While it is true that there are allusions in defendants-appellants' brief to matters not part of the record on appeal, this court determines the appeal solely upon the record, not upon the statement of facts or upon any materials attached to the briefs of the parties. This court has thoroughly examined the record on appeal, consisting of a transcript of proceedings more than 2,000 pages long and numerous exhibits and filings, and confines consideration to those matters which have been certified by the clerk of the trial court as constituting part of the record on appeal, including the transcript of proceedings and exhibits thereto. See App. R. 9(A). The motion to dismiss is overruled.

The second procedural issue raised by plaintiff is an objection to a panel change and motion for appropriate relief, which is supported by an affidavit of one of the Ohio counsel for plaintiff. Alleged in the affidavit is that one of the judges sitting on the day in question elected not to sit on this case, and another judge of the court was substituted for him. The affidavit alleges that the reason the judge elected not to sit was because someone talked with the presiding judge of this court and raised some questions concerning some possible contact between the recusing judge and the trial judge. Included in the affidavit is a statement that to the best of plaintiff's counsel's knowledge, no one representing plaintiff made any such *ex parte* contact with the presiding judge of this court, who was not a member of the panel hearing this case, and plaintiff's counsel suggests in his memorandum that such a contact must have been made by counsel for defendants.

Counsel for defendants has filed a memorandum opposing such motion, to which also is attached an affidavit stating that they had no knowledge of the change of panel or of plaintiff's objection until the actual calling of the case for oral argument, and further stating that none of the counsel for defendants at any time asked the presiding judge of this court, or any other person, to convey to the recusing judge that he should withdraw from the panel. Defendants' counsel indicates no objection to having the recusing judge sit as a member of the panel in this case, nor any objection to the panel who actually heard the case hearing the matter. In short, it appears that one judge of this court recused himself voluntarily because of an apparently unfounded rumor he heard. Of course, no party is entitled to a panel of judges of this court of his own choosing. It is not uncommon for a judge

of this court for personal reasons to "trade" with another judge assignments on a particular day or with respect to a particular case, usually for the personal convenience of the judges involved. No impropriety has been suggested by either affidavit filed on the part of any judge of this court. The members of the panel deciding this case know of no reason why they should not sit as members of the panel. No affidavits of prejudice or disqualification have been filed by any party. Accordingly, plaintiff's objection to the panel change is overruled.

By his second amended complaint, plaintiff Robert Guccione seeks compensatory and punitive damages against defendants Flynt and Hustler Magazine with respect to publications in Hustler Magazine in May 1976, February 1979 and June 1979, upon both a claim of libel and a claim of invasion of privacy.

The trial court found that the libel claim with respect to the May 1976 issue of Hustler was not commenced within the applicable one-year statute of limitations, R. C. 2305.11, having been published some 13 months prior to commencement of this action. With respect to the invasion-of-privacy claim as to the May 1976 issue of Hustler, the trial court found that the substantive law of New York is to be applied and that the claim also was barred by the one-year limitation. Having made Civ. R. 54(B) findings, the dismissal of the second count (the claim of invasion of privacy by the May 1976 issue of Hustler) was appealed to this court, resulting in an affirmance of the trial court by the unreported decision in *Guccione v. Hustler Magazine*, No. 80AP-204, rendered September 30, 1980 (1980 Decisions, page 3104).

In the meantime, the case proceeded to trial upon the remaining counts of the complaint relating to the

February and June 1979 issues of Hustler. At the conclusion of his case, plaintiff voluntarily withdrew, or dismissed, his claims (counts three and four of the second amended complaint) as to the February 1979 issue of Hustler. The trial proceeded solely upon the two claims with respect to the June 1979 issue of Hustler, one for libel and the other for invasion of privacy. In regard to this invasion-of-privacy claim, the trial court also applied New York substantive law, as to which no party has objected. As noted above, the trial produced a voluminous record, including a transcript of proceedings of more than 2,000 pages and numerous exhibits.

Although not readily apparent from reading the record, the case was submitted to the jury solely upon the claims of libel and invasion of privacy with respect to the June 1979 issue of Hustler Magazine, in which plaintiff was depicted engaged in an act of buggery, with the caption, "Bob Guccione Discovers Vaseline," which defendants contend is a somewhat oblique reference to a photographic technique used by plaintiff. A photograph of the head of plaintiff taken from a photograph purchased from U.P.I. for $50 was superimposed on the man performing buggery so as to represent plaintiff Guccione.

The trial court directed a verdict in favor of plaintiff with respect to the invasion-of-privacy claim under New York law as to defendant Hustler Magazine and submitted this claim to the jury upon the issue of compensatory and punitive damages and upon the issue of whether defendant Flynt knew that no consent had been obtained from plaintiff Guccione to use his photograph. The trial court also submitted the libel claim with respect to the same publication to the jury for determination of whether it was libelous under the circumstances since plaintiff, like defendant Flynt, is a national figure as a publisher

of a pornographic magazine, having made many appearances and given many interviews.

The verdict forms were somewhat unusual, the basic form dealing only with the issue of liability, with the jury returning a verdict in favor of plaintiff and against both defendants with respect to both the libel and invasion-of-privacy claims by separate verdicts. With respect to damages, two verdict forms were submitted, one with respect to defendant Hustler, Inc., and the other with respect to defendant Flynt. Each form inquired separately with respect to invasion of privacy and libel by a "yes" or "no" answer, asking the jury to answer with respect to each claim whether it found (1) nominal damages, (2) compensatory damages, (3) punitive damages and (4) reasonable attorney fees. With respect to defendant Hustler, the jury gave affirmative responses with respect to compensatory and punitive damages and attorney fees upon the invasion-of-privacy claim and as to punitive damages upon the libel claim. The converse was true with respect to defendant Flynt, the jury indicating that it found compensatory and punitive damages and reasonable attorney fees with respect to the libel claim as against defendant Flynt but only punitive damages as to the invasion-of-privacy claim. The jury then returned a monetary verdict in the amount of $1,150,000 as compensatory damages and $11,000,000 as punitive damages as against defendant Hustler, Inc., and $2,150,000 compensatory and damages and $26,000,000 punitive damages as against defendant Flynt. The verdict indicated in each instance that $150,000 of the compensatory damages was for attorney fees.

Upon receiving the verdict, the trial court immediately reduced the verdict against Flynt to $1,150,000 for compensatory damages, so that it would be consistent with the verdict against defendant Hustler, Inc., as to which

counsel for plaintiff consented, and counsel for defendants imposed no objection. Judgment was entered accordingly.

Both defendants filed a motion for new trial and for judgment notwithstanding the verdict. The trial court conditionally sustained the motion for new trial, finding the amount of punitive damages to be excessive, subject to a remittitur ordered by the court reducing the punitive damages against defendant Hustler, Inc., to $850,000 as as to the invasion-of-privacy claim and $1.00 as to the libel claim, and reducing the punitive damages as against defendant Flynt to $2,000,000 on the libel claim and $1.00 on the invasion-of-privacy claim. Plaintiff accepted the remittitur and has filed no notice of appeal or cross-appeal and no assignments of error herein. Defendants, on the other hand, have both appealed.

By the first assignment of error, defendants contend that the trial court erred in allowing evidence of plaintiff's fears as to possible publications concerning other members of his family. Specifically, defendants contend prejudicial error in admitting the following testimony of plaintiff (Tr. 545-546):

> "I was very much aware of my public figure status, and since this was one link in a long chain of similar experiences with Hustler Magazine, I worried very much what the next step would be. Would it be a picture of my daughter, who was then 18 years old, would it be my mother appearing in the centerfold. All of this was possible as it had already been demonstrated to us.
>
> "As a public figure, I felt there may be an argument as to how much privacy I was entitled to as an individual. But what concerned me most profoundly at the time was to what extent was the privacy of my mother, my father—

"MR. STURTZ: Object, Your Honor.

"THE WITNESS: —my children, my friends and my colleagues, the people I work with, the woman I love.

"THE COURT: Just a moment.

"THE WITNESS: To what extent was their privacy also surrendered.

"THE COURT: Just a moment. There has been an objection lodged."

The trial court overruled the objection upon the basis that plaintiff's thought processes were admissible. Shortly thereafter, when asked to "characterize the intensity of the feelings that you had," plaintiff testified (Tr. 547-548):

"I can't describe how hurt I was, because as I say something like that involved not only me but my children, particularly. I had four young boys and a little young daughter, three of whom were then in school, the two daughters were too young to go, I'm sorry, three of my five children were still in school and I know how evil school children can be without realizing that they are being evil.

"MR. STURTZ: Continuing objection.

"THE WITNESS: And I had no idea of how this man could be stopped."

That such a blatant appeal to the passion and prejudice of the jury is inadmissible is readily apparent. The prejudicial effect is manifested by the jury verdict.

Plaintiff contends that this testimony was admissible because the mental suffering of the defamed person is a proper element to be considered in awarding compensa-

tory damages for the libel. However, the above-quoted testimony of plaintiff did not relate to plaintiff Guccione's fear of impaired relationship with his family because of the libel but, rather, related to his claimed fear of possible future libels against members of his family. Basically, the type of mental distress or suffering to be considered in determining compensatory damages for libel is shame or humiliation. Plaintiff's testimony relates to anger, not shame or humiliation. Plaintiff further relies upon the following quotation from 34 Ohio Jurisprudence 2d 274, Libel and Slander, Section 111:

> "• • • it is generally held that in all cases of defamation where the plaintiff is entitled to recover damages for mental suffering, his own testimony as to his suffering is admissible. Evidence as to whether the plaintiff in an action for libel and slander is married and has children or other relatives is held to be admissible as an important factor on the question of recovery for the mental anguish suffered by him. But the general rule seems to be that neither the grief experienced by the members of the plaintiff's family on reading an alleged libelous article regarding him, nor the influence of such grief on the plaintiff's mind, is an element of damages recoverable in his action for the defamation."

If applied herein, plaintiff's testimony would be precluded since he is testifying as to his fear of possible future libels against members of his family. Even assuming that a libeled party may testify as to his apprehension of shame and humiliation heaped upon members of his family because of the libelous publication involved, such a principle would not support the admission of the testimony above quoted. The first assignment of error is well taken.

By the second assignment of error, defendants first contend that the trial court erred in permitting plaintiff to read defendant Flynt's deposition as upon cross-examination only. Civ. R. 32(A) provides for the use of depositions at trial, and in pertinent part reads:

> "At the trial • • • any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:
>
> "• • •
>
> "(2) The deposition of a party • • • may be used by an adverse party for any purpose."

Accordingly, plaintiff Guccione was entitled to read at trial all or any part of defendant Flynt's deposition limited only by the requirement that the part read must contain evidence which would be admissible if presented for the first time at trial.

Defendants also contend that the portion of defendant Flynt's deposition read at trial included much inadmissible evidence. The fourth assignment of error raises a similar issue and will be considered in conjunction with the second.

Unfortunately, the record is replete with inadmissible, inflammatory testimony. This is true with respect to the deposition of defendant Flynt. The cross-examination was permitted to drift far afield from any legitimate issue concerning the libel claim, damages in connection therewith or credibility of the witness. Rather, the examination was designed, and accomplished its purpose, of depicting defendant Flynt as an evil person who was wont to

make malicious, libelous attacks not just upon plaintiff but upon many other public and private persons. This unnecessarily resulted in the introduction into evidence of many grossly vulgar exhibits which cannot be described other than filth. Unfortunately, this trend continued during the cross-examination of plaintiff by defendants' counsel, and much of the evidence admitted over strenuous objections by plaintiff's counsel likewise should have been excluded.

The basic problem with the evidence admitted during the cross-examination of defendant Flynt was that it was designed to create passion and prejudice in the jury against defendant Flynt and Hustler Magazine. While at the time in question the claim with respect to the February 1979 issue of Hustler had not been withdrawn, there is much detailed evidence concerning many other publications with references to plaintiff, one of his publications, or his mistress. Past libels by defendants of plaintiff Guccione may be admissible as having a bearing upon the issue of actual or express malice. Cross-examination with respect to such past libels, however, should be limited to the fact of publication and whether they were contended to be truthful statements. While it is appropriate cross-examination to inquire into the state of mind of the publisher at the time of publication of the libel upon which the claim is predicated, a more limited inquiry is appropriate with respect to alleged past libels of the plaintiff by defendants, which are admissible as bearing only upon the issue of malice. Otherwise, despite cautionary instructions, the jury is apt to become confused as to the basis upon which damages are to be predicated, and passion and prejudice is apt to be created. To some degree, plaintiff may proceed upon such examination at his own peril, with a resultant defective verdict (influenced by passion and prejudice) if the plaintiff goes too far with the cross-examination.

With respect to publications concerning other persons, whether or not libelous, the evidence was inadmissible. Some of the evidence was contained in the deposition and some was elicited during the examination of defendant Flynt at trial. Unfortunately, there was no objection to some of the inadmissible evidence. Clearly, evidence concerning alleged attacks upon public figures such as George Wallace, Gerald Ford, Nelson Rockefeller, Henry Kissinger, Jackie Onassis and Ruth Stapleton Carter were inadmissible, as was extensive cross-examination concerning prior interviews that defendant Flynt had given. While some of this may have been admissible had defendant Flynt's character been in issue, it was not. Rather, the issue was whether defendant Flynt acted with actual or express malice in connection with the depiction of plaintiff in the June 1979 issue of Hustler Magazine. As the case finally emerged, this was the sole issue upon which any of the extraneous evidence could conceivably be admissible.

There was no attempt to utilize prior statements of defendant Flynt for impeachment purposes, there being no indication of any inconsistency between his testimony at trial and his prior statements. Attacking the character of the witness is not a proper method of impeachment. Although cross-examination as to specific instances of conduct is permissible if clearly probative as to the truthfulness or untruthfulness of the witness, general attacks upon the character of the witness are not permissible. See Evid. R. 608(B). The cross-examination in this case of defendant Flynt was clearly designed to attack his character in general, not merely his credibility. As the trial court has already found, the improper cross-examination had its prejudicial effect through a greatly inflated verdict. The second and fourth assignments of error are well taken to the extent that the trial court overruled objections as to inquiry concerning (1) defendant Flynt's attitudes

generally, (2) libelous attacks on persons other than plaintiff Guccione himself, (3) defendant Flynt's character generally and (4) statements which defendant Flynt made during prior interviews, unless the same constituted either an admission or a statement directly inconsistent with testimony at trial. As we have previously noted, defendant Flynt's character was not an issue, and most of this evidence bore solely upon the issue of his character. Specificity as to specific questions we feel to be unnecessary, it being sufficient to note that upon retrial the trial court should limit inquiry in accordance with Evid. R. 403, 404 and 608.

By the third assignment of error, defendants contend that the trial court committed error in excluding evidence concerning plaintiff, consisting in part of articles written about plaintiff, as well as some questions asked upon cross-examination of plaintiff.

Unfortunately, it is somewhat difficult in this case "to separate the wheat from the chaff." Defendants' cross-examination of plaintiff is so replete with inadmissible evidence, which the trial court admitted over objection, that it is difficult to find any prejudicial error in any exclusion of evidence.

There was no effort to show the truth of the matters asserted in the publications involved, although there was extensive cross-examination concerning defendants' photographic technique, coupled with the vaseline reference in the cartoon published in the June 1979 issue of Hustler. There was also some effort, quite properly, to show that plaintiff Guccione also is the publisher of pornographic literature, although not as vulgar or vile as defendants' publications. The trial court has discretion to exclude evidence when it becomes cumulative. Some of the excluded evidence would merely have been cumulative.

Clearly, if plaintiff Guccione is the publisher of a magazine, he is responsible for its contents regardless of whether he has actual knowledge thereof. Much of plaintiff's testimony was devoted to whether he had actual knowledge of a specific issue of one of the magazines of which he is the publisher; whereas, it is sufficient for the purpose involved to show that he is the publisher. A publisher is presumed to have knowledge of the general type of publication that is involved, although he may delegate to others determination as to specific content to be included in a given issue. Therefore, the trial court did not err in excluding material in publications published by plaintiff since at best it would be cumulative, and since it would appear that if any error were involved it was by admitting too much rather than too little.

Defendants also contend that the trial court improperly excluded newspaper and magazine articles containing purported statements by, or interviews with, plaintiff. Since damages for libel may be predicated upon injury to reputation, it is appropriate for the defendants to demonstrate that, although the publication is libelous, it has caused little injury to the reputation of the plaintiff. A knowingly false, malicious and libelous statement that one has committed an armed robbery would cause little damage to the reputation of a felon who has been convicted of several armed robberies in the recent past. Therefore, it would be appropriate to show that, although the particular statement was false and malicious, it was consistent with the reputation of the libeled person. Ordinarily, evidence of specific acts of misconduct is not admissible as having a bearing upon reputation. See Annotation 130 A.L.R. 854; *Fisher v. Patterson* (1846), 14 Ohio 418. *C.f.* Evid. R. 405 (B).

In a libel action, however, as noted above, the reputation of the plaintiff is an issue. R. C. 2739.02 provides that: "Any mitigating circumstances may be proved to reduce damages." Reputation, however, is not proved by showing that others in the past have slandered or libeled the plaintiff in the same manner as defendants. See *Flower v. Chichester* (1874), 26 Ohio St. 9.

Reputations of persons are predicated upon information available to those who know them or of them. With respect to public figures, reputations are largely predicated upon that which has been published by the news media and in magazines and other publications concerning the public figure. Thus, it would be incorrect to hold that no newspaper or magazine article concerning a public-figure plaintiff in a libel action is admissible. If properly proved and relevant to the issues, such a newspaper or magazine article may have an important bearing upon the issue of reputation of the plaintiff. Such an article may not be deemed proof of acts of specific conduct but, rather, evidence of the general reputation of the plaintiff. While plaintiff contends that such newspaper and magazine articles should be excluded as hearsay, admission of them as bearing upon reputation is not for the truth of the statements involved but, rather, for the fact that the statements have been made and constitute the basis for the general impression of the reputation of the public figure. As provided by Evid. R. 803(20), evidence as to the reputation of a person's character in the community is not excluded by the hearsay rule.

Nevertheless, we find no prejudicial error under the circumstances of this case. Extensive cross-examination of plaintiff was permitted. The jury could not be unaware that plaintiff was a public figure because of his engaging in the business of publishing pornographic literature and

being an advocate that there should be no limitation upon what may be published. Further evidence would have been cumulative at best. In addition, none of the evidence bore directly upon plaintiff's reputation with respect to engaging in the type of conduct depicted in the June 1979 issue of Hustler. Although plaintiff readily admitted that he gave interviews concerning his sexual activities, he expressly denied engaging in the type of sexual activity depicted and professed to be greatly offended and angered by the publication. Even a person who permits his life to be an "open book" may be as offended as one who does not, with respect to the publication of false statements concerning his life or lifestyle. We find no prejudicial error, and the third assignment of error is not well taken.

The fifth assignment of error relates to plaintiff's testimony concerning statements by and reactions of his 14-year-old son in connection with the June 1979 issue of Hustler. When asked as to the circumstances of his first learning of the defamatory picture in the June 1979 issue of Hustler, plaintiff responded (Tr. 543): "When my 14-year-old son, with his face bloodied and two broken fingers, handed it to me, told me he had been beaten up by his classmates, his father had been called a queer." Clearly, this is inadmissible hearsay testimony. Nor were the circumstances of his learning of the libel particularly pertinent to the case. However, no objection was interposed by defendants at this point. A few questions later, plaintiff stated that he feared that the publication might be damaging to his business, at which point an objection was interposed, and it was stipulated "that no claim is being made in this lawsuit to recover any damages for business loss." Then followed the testimony which was the subject of the first assignment of error.

Defendants further contend that the testimony was inconsistent with, or not revealed in, plaintiff Guccione's deposition, and bore upon matters as to which discovery was denied. Defendants improperly characterized the testimony as perjured since the record reflects no basis for such a characterization, although the record does reflect unnecessarily that defendants have filed a motion pursuant to Civ. R. 60(B) predicated, at least in part, upon a claim that the testimony was false.

Nevertheless, having failed to make any timely objection to the question or answer, even though clearly inadmissible hearsay, defendants cannot raise the issue of admissibility of the evidence on appeal. The testimony was admitted without objection even though inadmissible. The fifth assignment of error is not well taken.

By the sixth assignment of error, defendants contend that misconduct of plaintiff's out-of-state co-counsel so interfered with their right of cross-examination of plaintiff Guccione that they should be entitled to a new trial. We find no error in this regard. Plaintiff's out-of-state co-counsel did make numerous interruptions during defendants' cross-examination of plaintiff Guccione by interposing objections, many of which should have been sustained. While it is apparent from the record that plaintiff's New York co-counsel is somewhat bombastic and conducts a vigorous prosecution of his case, we find no basis for this assignment of error in the record. If anything, the trial court permitted defendants much greater latitude in cross-examination of plaintiff than was appropriate. Although there is no cross-appeal or cross-assignments of error, it is apparent from the record that the trial court should have sustained, rather than overruled, many of the objections interposed by plaintiff's New York co-counsel. We find no misconduct on his part apparent from

the face of the record, although, as we shall discuss later, he may have been somewhat overzealous in his prosecution of this case, resulting in a verdict influenced by passion and prejudice. The sixth assignment of error is not well taken.

The seventh and ninth assignments of error are interrelated, the seventh contending that the verdicts are against the manifest weight of the evidence, and the ninth contending that the trial court erred in overruling a motion to dismiss with respect to defendant Flynt. This assignment of error must be separately considered with respect to the claims of invasion of privacy and libel. Interesingly, plaintiff in his brief makes no direct reference to the invasion-of-privacy claim, and the jury awarded no compensatory damages against defendant Flynt with respect thereto.

A review of the record reveals no evidence whatsoever supporting the invasion-of-privacy claim as against defendant Flynt.

As noted previously, New York substantive law applies to the invasion-of-privacy claim. Under New York law, there is no common law right of privacy giving rise to an action for invasion of privacy. Rather, the right of privacy is controlled by statute, giving a "person whose name, portrait or picture is used * * * for advertising purposes or for the purposes of trade without the written consent first obtained" a right to maintain an action to enjoin future use of his name, and in addition a right to recover damages "for any injury sustained by reason of such use." In addition, exemplary damages may be awarded "if the defendant shall have knowingly used such person's name, portrait or picture." Under such a provision, the nature of the statement or the manner in which

the person's name, portrait or picture is used is immaterial to there being a right of action.

Although defendants incorrectly indicate that plaintiff's burden of proof is by clear and convincing evidence, nevertheless, plaintiff produced no evidence from which it reasonably could be inferred that defendant Flynt had any connection with the June 1979 publication other than as publisher of Hustler. There is no evidence of direct involvement with respect to this particular publication, either by use of plaintiff's name or the obtaining of the photograph and use thereof, although there was evidence that three years previously defendant Flynt had considerable direct involvement with respect to the May 1976 issue of Hustler. In the meantime, defendant Flynt had been injured by an assassin's bullet, and, according to his testimony, had never resumed the same type of direct involvement in publication of Hustler as he had previously. Even if the trier of the fact does not believe Flynt, at best, the evidence is then in equipoise. Construing the evidence most strongly in favor of plaintiff, reasonable minds could only conclude that defendant Flynt was not personally responsible for any invasion of plaintiff's privacy in violation of the New York statute that may have been committed by Hustler, Inc. His position as publisher and chairman of the board of Hustler does not make him responsible for an invasion of privacy in violation of the New York statute of which he has no personal involvement.

On the other hand, defendant Flynt's position as the publisher and chairman of the board of Hustler makes him individually liable for a libel printed in Hustler, even if he had no actual knowledge of the libel prior to its publication. *Goudy v. Dayton Newspapers, Inc.* (1967), 14 Ohio App. 2d 207. The rule is well stated in 50 American Jurisprudence 2d 859, Libel and Slander, Section 336:

> "An editor or manager of a newspaper, who has active charge and control of its management, conduct, and policy, generally is held to be equally liable with the owner for the publication therein of a libelous article. On the theory that it is his duty to know and control the contents of the paper, it is held that he cannot evade responsibility by abandoning his duties to employees, so that it is immaterial whether or not he knew the contents of the publication. * * *"

Since defendant Flynt admits he was publisher and chairman of the board of Hustler at the time in question, he is responsible for the libel of plaintiff in the June 1979 issue of Hustler, whether or not defendant Flynt had knowledge thereof prior to publication. In addition, there is ample circumstantial evidence that the publication in the June 1979 issue of Hustler was a continuation of a policy previously established by defendant Flynt when he was president, as well as publisher and chairman of the board, of Hustler.

Accordingly, the seventh and ninth assignments of error are well taken with respect to plaintiff's claim of invasion of privacy but are not well taken with respect to defendants' claim of libel.

By the eighth assignment of error, defendants contend that the trial court abused its discretion in excluding expert testimony on the topics of humor and satire. We find no abuse of discretion. While defendants' defense was that the July 1979 publication directed at plaintiff was intended as satire, such an intent does not render the statement any less libelous. The defense that what would otherwise be libelous was satire or spoken in jest is available only if the defendants prove that it is manifestly clear from the language employed and pictures

used that together they could in no respect be regarded as an attack upon the reputation or business of the person named or depicted. See *Goudy supra*, and Annotation 77 A.L.R. 612. The necessity of expert testimony to define satire negates the existence of the manifest clarity necessary for the defense of jest or satire. It must appear obvious to the average reader that jest or satire, rather than an attack upon the reputation of the person involved, is intended for there to be a viable defense that the libel was published as a jest or satire. The eighth assignment of error is not well taken.

By the tenth assignment of error, defendants contend that the trial court erred in overruling their motion for mistrial during closing argument of plaintiff's counsel. We find no abuse of discretion on the part of the trial court in overruling the motion for mistrial. While the argument objected to was an appeal to the passion and prejudice of the jury, at that point it conceivably could have been cured by a cautionary instruction. In any event, the motion came at the end of a very lengthy trial, at which point it was still possible that a verdict favorable to defendants would be returned by the jury, despite the tenor of the argument by plaintiff's counsel. Accordingly, the tenth assignment of error is not well taken.

By the eleventh assignment of error, defendants contend that the trial court erred in directing a verdict against defendant Hustler upon the invasion-of-privacy claim predicated upon New York law. Alternatively, defendant Hustler contends that an award of damages upon such claim should not be other than "publicity value" under the circumstances of this case.

A claim under the New York statute was proved. That statute prohibits use of the name or photograph of a person without his written consent for advertising or

trade purposes. It is undisputed that defendant Hustler did not have the written consent of plaintiff to use either his name or his photograph.

Defendant Hustler further contends that no independent damages other than the price that should be paid for use of the photograph have been proved. We agree. While plaintiff had both a claim for invasion of privacy under the New York law, and one for libel, there is a certain overlapping of the alleged injuries. No separate and distinct injury was proved with respect to the invasion-of-privacy claim (other than not being paid for use of the photograph), the gravamen of all the evidence being damages flowing from defamation. For such injury, plaintiff is entitled to a single recovery, even assuming that he may pursue separate theories for that recovery. He has, however, sustained a single injury. Accordingly, compensatory damages with respect to the invasion-of-privacy claim should have been limited to the compensation that plaintiff should have been paid for use of his photograph. The only evidence in this regard was that defendants paid $50 to obtain the photograph for use. Plaintiff adduced no evidence of a greater value for use of his photograph. In fact, plaintiff Guccione himself testified that he had no objection to publication of his photograph, or apparently use of his name, so long as it was used respectfully, stating (Tr. 857-858):

> "Q. And so if it is a perfectly respectable picture, as far as you are concerned then others may publish your picture; is that your testimony?
>
> "A. If it is a respectable picture employed in a respectable context, I have no objection.
>
> "Q. So it is the picture and the contents that you are concerned about?
>
> "A. Yes. The same concern anyone would have."

In short, plaintiff Guccione was not concerned with the unauthorized use of his photograph or name but, rather, with the defamation connected with such use. The eleventh assignment of error is well taken to the extent indicated.

By the twelfth assignment of error, defendants contend that the trial court erred in submitting to the jury the issue of whether the publication was libel *per se* and erred in defining actual malice in this respect.

The trial court defined actual malice differently with respect to a determination of whether there is actionable libel, than with respect to a determination of whether punitive damages will be appropriate. With respect to punitive damages, the trial court used the term personal or express malice, rather than actual malice. With respect to the determination of whether there is actionable libel, the trial court essentially defined actual malice similarly to many definitions of constructive malice. However, it did in part conform to the usage of the term "actual malice" as a prerequisite to a libel action by a public official in *New York Times v. Sullivan* (1964), 376 U.S. 254, 84 S.Ct. 710, and *St. Amant v. Thompson* (1968), 390 U.S. 727, 88 S.Ct. 1323. In *New York Times*, the Supreme Court at page 279 defined actual malice as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." In *St. Amant*, rather than concentrating on "actual malice," the Supreme Court emphasized a bad-faith test, that is whether the publication was made in good faith or bad faith but applying the same definition. The trial court expanded upon the definitions in *New York Times* and *St. Amant*, arguably in some respects more favorable to defendants and in some respects more favorable to plaintiff

than justified. Nevertheless, we find no prejudicial error for two reasons.

First, defendants did not interpose an express objection to the charge and, therefore, are precluded from raising the issue on appeal by Civ. R. 51(A).

Secondly, the claim is predicated solely upon one publication, that of the June 1979 issue of Hustler depicting plaintiff engaging in an act of buggery with another man. Defendants at no time made any effort to even suggest that plaintiff in fact ever engaged in any such act. Rather, as noted above, defendants' defense was that this was satire, even though the actual act depicted was untrue. Construing the evidence most strongly in favor of defendants, reasonable minds could only conclude that defendants published this picture in the June 1979 issue of Hustler with reckless disregard for its truth or falsity, if not with actual knowledge of its falsity.

There has been no contention made by defendants that plaintiff at any time engaged in conduct of the type depicted in the June 1979 issue of Hustler. The only reasonable inference from the evidence is that defendants had no basis whatsoever for even thinking it possible that plaintiff might have engaged in such conduct. While it is difficult to conceive of any reasonable basis for a contention that defendants did not know of the falsity of the implication from the June 1979 issue of Hustler with respect to plaintiff, no reasonable contention can be made but that the picture of plaintiff engaged in such conduct was published with reckless disregard of whether it was false or true.

While defendants contend that the picture was intended as satire, the innocent satire is so subtle that it escaped plaintiff, escaped the trial court, escaped the

jury and escapes this court. To the average person viewing the picture in question, it is quite clear that it is intended to portray plaintiff Guccione engaging in an act of buggery, with no implication other than that he engages in such an act, despite the caption which might have a double meaning to those engaged in certain types of photography. The fact that the satire, with a resultant understanding that no libel is intended, might be apparent to a limited number of readers having special knowledge does not render the publication any less libelous when it is given general circulation. While Hustler does not have general circulation, being limited to a small subculture (evidence of circulation figures indicates a circulation of less than 2 percent of the general population of this country), there is no evidence from which it reasonably could be concluded that more than a few members of this subculture would understand that the publication did not intend to suggest that plaintiff engaged in the type of activity depicted.

In addition, we conclude that the publication constitutes libel *per se*, rather than libel *per quod*, since no reasonable conclusion could be reached other than that the publication was intended to injure plaintiff's reputation or to bring him into public contempt. Accordingly, as we have indicated, even if there be error in the court's charge on actual malice, it is not prejudicial since the publication as a matter of law constitutes libel *per se* under all applicable definitions. The twelfth assignment of error is not well taken.

The thirteenth assignment of error raises a similar issue to that raised in the seventh and ninth assignments of error, contending it to be improper to find defendant Flynt personally liable on the invasion-of-privacy claim under the evidence adduced and is well taken for the

same reasons stated with respect to those assignments of error.

The fourteenth assignment of error relates to the trial court's charge. Defendants had requested an instruction to the effect that other publications regarding plaintiff Guccione are not admissible to aggravate or enhance damages. The trial court did not give this requested instruction, which was slightly inaccurate since it dealt with the issue of admissibility of evidence, rather than use to be made of that evidence by the jury. The trial court instead instructed the jury (Tr. 2007):

> "* * * These other examples of publications are not the basis for Plaintiff's claims of libel which you are considering, nor are the other exhibits admitted during the course of trial. These Plaintiff's Exhibits were admitted for, among other things, to support Plaintiff's contention that they furnish proof of either actual or expressed malice or ill will or hatred toward the Plaintiff on the part of the Defendants."

While there may be some merit to defendants' contention that such instruction fails to limit the jury's consideration of the evidence and raises a possibility that the jury predicated its determination of the amount of damages upon such other evidence rather than limiting it to the publication upon which plaintiff's case is based, defendants did not call the matter to the trial court's attention at the conclusion of the charge and, thus, are precluded by Civ. R. 51(A) from contending error in this respect. Therefore, the fourteenth assignment of error is not well taken.

By the fifteenth assignment of error, defendants contend that the trial court erred in permitting the jury to award attorney fees based upon insufficient and im-

proper evidence. We find no merit to this contention. The evidence concerning attorney fees was admitted by stipulation. While defendants reserved the right to object to the admissibility of the evidence, they offered no evidence of their own as to the reasonableness of the attorney fees so stipulated. Rather, defendants stipulated if called as witnesses two of plaintiff's counsel would testify that the fees were reasonable and necessary. Accordingly, there is no merit to this assignment of error, and it is, therefore, not well taken.

By the sixteenth assignment of error, defendants contend that the trial court erred in failing to give a cautionary instruction with respect to the reading of the deposition of defendant Flynt during plaintiff's case. The record fails to reflect any objection interposed by defendants with respect to the failure to give such a cautionary instruction, nor any requests for same. Accordingly, defendants may not properly raise this issue on appeal. See Civ. R. 51(A). The sixteenth assignment of error is not well taken.

By the seventeenth assignment of error, defendants contend that the jury verdicts are hopelessly inconsistent and defective. We agree. Plaintiff on the other hand contends that the verdict taken as a whole is appropriate, although conceding some difficulty in reconciling the parts, which plaintiff characterizes as an effort by the jury to avoid aggregating compensatory damages for both libel and invasion of privacy.

A somewhat unusual form of jury verdict was utilized in this case as to which no objection has been interposed by any party, so that any error in the utilization of these particular forms with respect to ascertainment of damages has been waived by the parties.

The verdict forms with respect to damages inquired separately with respect to each defendant, and with respect

to each the claim for invasion of privacy and the claim for libel as to whether the jury found: (1) nominal damages, (2) compensatory damages, (3) punitive damages and (4) attorney fees, specifically calling for a "yes" or "no" answer with respect to each. It was further printed on the form that: "A Plaintiff may not collect twice for compensatory damages proximately caused by the same act." It was not clarified to the jury, however, that the act constituting the invasion of privacy was the same as the act constituting the libel. In fact, the two acts are different and separable, although they may cause a single injury. Rather, the verdict form went on to state: "Therefore, you may award compensatory damages, if any, only for the total damage caused whether or not one or both defendants may have been liable therefor." This apparently caused considerable confusion for the jury. As to defendant Hustler the jury indicated with respect to the invasion-of-privacy claim that it did not find nominal damages but did find (1) compensatory damages, (2) punitive damages and (3) attorney fees. At the same time with respect to Hustler, the jury gave a negative response with respect to the claim for libel to all questions except that of punitive damages, indicating that it found punitive damages as to both invasion of privacy and libel consistent with the statement on the verdict form that: "However, you, in your discretion, may award punitive damages separately if you decide to award any such punitive damages." Based thereupon, the jury returned a verdict in the amount of $1,150,000 in compensatory damages against defendant Hustler, which in accordance with the jury form was solely compensatory damages for invasion of privacy.

The converse was true with respect to defendant Flynt. The jury indicated that it found no nominal or compensatory damages or attorney fees with respect to the invasion-of-privacy claim as against defendant Flynt but did find

punitive damages. With respect to the libel claim as against defendant Flynt, the jury found no nominal damages but did indicate that it found compensatory and punitive damages, as well as attorney fees. Consistent therewith, the jury returned a verdict against defendant Flynt in the amount of $2,150,000 as compensatory damages. The compensatory damages clearly were intended to be upon the libel claim with respect to defendant Flynt and the invasion-of-privacy claim with respect to defendant Hustler, for a total compensatory damage verdict of $3,150,000. (Pursuant to the instructions the $150,000 found as attorney fees was added to the compensatory damages.) In addition, the jury found punitive damages upon both the invasion-of-privacy and libel claims as against defendant Flynt in the amount of $26,000,000 and as against defendant Hustler in the amount of $11,000,000. The jury obviously did not understand the instruction properly given by the trial court that it would be improper for the jury to return punitive damages as to any claim unless it first found compensatory damages with respect to that claim.

In this case, the jury awarded punitive damages as against defendant Flynt with respect to the invasion-of-privacy claim, even though the jury found no nominal or compensatory damages with respect to that claim as against him. Likewise, the jury awarded punitive damages upon the libel claim as against defendant Hustler, even though it awarded no nominal or compensatory damages with respect to that claim against it. Obviously, the jury did not understand the further instruction by the court contained on the verdict forms that:

> "The Court would point out again that although you may award punitive damages in your discretion as to either or both defendants, based upon the sepa-

rate conduct of each of them, you may only award compensatory damages for the total damages allegedly caused, whether or not one or both of the defendants may be held liable therefor."

As expressly stated in the first paragraph of the syllabus of *Richard v. Hunter* (1949), 151 Ohio St. 185: "Exemplary or punitive damages may not be awarded in the absence of proof of actual damages." That case holds that, where a verdict expressly makes no award for compensatory damages, a verdict for punitive damages is defective and does not authorize a judgment in favor of the plaintiff.

The trial court upon receiving the verdict attempted to correct the error by reducing the verdict for compensatory damages to $1,150,000 total (including attorney fees) but jointly against defendants. This reduction was inconsistent with the apparent intent of the jury; however, no party objected but all acquiesced, and the jurors, when advised of the change and polled, each indicated that it was his verdict. This further indicates a misunderstanding on the part of the jurors as to their function.

As noted previously, defendants did not make timely objection before the jury was discharged as to the patent inconsistencies in the verdict. Rather, the defendants acquiesced in the trial court's first effort to correct the defective verdict by reducing the award of compensatory damages, although they have objected to the trial court's second effort in awarding nominal damages where the jury found none, and reducing the punitive damage award on that claim to $1.00. Whether the trial court's efforts cured the defects of the verdict is a matter for consideration in connection with another assignment of error. With respect to the seventeenth assignment of error, however, we find that it is not well taken since no timely objection

was made to the receipt of a defective verdict form at a time when it could be corrected by the trial court, and, thus, defendants may not predicate error solely upon the receipt of the defective verdict, although such defective verdict may be a consideration in determining whether or not defendants are entitled to a new trial because of an excessive verdict.

This is the issue raised by the eighteenth assignment of error. The trial court found the verdict greatly excessive with respect to punitive damages and ordered a remittitur. With respect to defendant Hustler, the trial court found that the verdict for punitive damages must be reduced to only 7.7 percent of the amount originally awarded, down to $850,000 from $11,000,000. With respect to defendant Flynt, the trial court made a similar reduction, reducing the punitive damage award to approximately 7.7 percent of the amount awarded by the jury from $26,000,000 to $2,000,000. In other words, in each instance the trial court found that the amount awarded by the jury was approximately 13 times that which could reasonably be awarded. No appeal has been taken, and no objection raised with respect to the trial court's finding that the jury verdict with respect to punitive damages was excessive to the extent found or that the maximum verdict for punitive damages that could be reasonably found by any reasonable trier of the facts would be $2,000,000 with respect to defendant Flynt and $850,000 with respect to defendant Hustler. Accordingly, we must accept these findings upon appeal. Thus, upon this appeal, we must start with the assumption that the jury verdict with respect to punitive damages was some 13 times greater than reasonably could be awarded upon the evidence involved.

Although not a libel action and involving compensatory rather than punitive damages, the Supreme Court in *Lar-*

rissey v. Norwalk Truck Lines (1951), 155 Ohio St. 207, noted that, where a verdict is so excessive as to have been given under the influence of passion or prejudice, it must be set aside and a new trial granted, a remittitur being inappropriate. In that case, however, the court noted in the fifth paragraph of the syllabus that: "The amount of a verdict is not of itself conclusive of the fact of passion or prejudice upon the part of the jury. * * *" Predicated upon this finding, as well as a finding of no indication of passion or prejudice from errors in the charge or conduct of counsel, the Supreme Court affirmed the action of the trial court ordering a remittitur to 35 percent of the original judgment. Likewise, in *Chester Park v. Shulte* (1929), 120 Ohio St. 273, a remittitur of 50 percent of the original judgment was affirmed, the Supreme Court stating in the second paragraph of the syllabus that:

> "If a trial court in an action for unliquidated damages finds that the verdict is excessive and that it was rendered under the influence of passion or prejudice, it has no alternative except to set it aside and grant a new trial."

Subsequently, in *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, the Supreme Court stated in the second paragraph of the syllabus that:

> "A remittitur amounting to fifty per cent of the verdict does not furnish conclusive proof that excessive damages were 'given under the influence of passion or prejudice.' (Paragraph 4 of Section 11576, General Code.)"

In addition, however, the Supreme Court set forth in the third paragraph of the syllabus a rule for determining whether an excessive verdict is influenced by passion and prejudice as follows:

"In order to determine whether excessive damages were so influenced, a reviewing court should consider, not only the amount of damages returned and the disparity between the verdict and remittitur where one has been entered, but it also becomes the duty of such court to ascertain whether the record discloses that the excessive damages were induced by (a) admission of incompetent evidence, (b) by misconduct on the part of the court or counsel, or (c) by any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should be awarded."

In *Cleveland Ry. Co. v. Crooks* (1935), 130 Ohio St. 255, the Supreme Court ordered a new trial where lower courts had ordered a remittitur to one-third of the original verdict, stating at page 256 of the *per curiam* opinion:

"* * * It is difficult to see how otherwise than from the influence of passion or prejudice a jury could in any case return a verdict practically three times as much as found by the Court of Appeals to have been supported by the evidence. * * *"

The Supreme Court found it unnecessary to determine whether such a reduction furnished conclusive proof that the excessive damages were given under the influence of passion or prejudice "for the reason that the record clearly discloses such improper statements of counsel," as to mislead the jury into returning an excessive verdict. The amount of the verdict is not conclusive of passion and prejudice (although the greater the excess the greater the probability of passion and prejudice), but, instead, the record must be closely scrutinized to see whether there are factors appealing to the sympathy of the jury, such as inadmissible evidence, erroneous instructions or improper conduct or argument appealing to the passion

and prejudice of the jury. See *Book v. Erskine & Sons* (1951), 154 Ohio St. 391, and *Hudock v. Youngstown Municipal Ry. Co.* (1956), 164 Ohio St. 493.

Examining the record reveals the following factors tending to appeal to the passion and prejudice of the jury: (1) evidence of apparent libel and invasion of privacy of persons other than plaintiff; (2) the efforts during cross-examination of defendant Flynt to depict him as an evil person; (3) the hearsay evidence as to plaintiff Guccione's son being attacked as a result of the libelous publication; (4) outburts of plaintiff Guccione during cross-examination tending to appeal to the passion and prejudice of the jury; (5) defendants' cross-examination of plaintiff Guccione in such a manner as conceivably could have prejudiced the jury against defendants; (6) the failure of the trial court to instruct the jury upon request that evidence of other alleged defamatory statements could not be considered in determining damages, and limiting consideration of such evidence to the issue of malice; and (7) the closing argument of plaintiff's counsel which was the subject of the motion for mistrial.

Many of these appeals to the passion and prejudice of the jury have been discussed in connection with other assignments of error. In addition, a portion of the closing argument of plaintiff's counsel clearly reveals an appeal to passion and prejudice (Tr. 1915-1916):

> "The law, you will learn, says that it is not Mr. Guccione's need which is relevant, but the necessity, the imperative crying necessity to put an end and stop to this kind of calumny.
>
> "What would stop Larry Flynt? The lawyers letter? He paid it no mind. The lawsuit, which was originally commenced, he laughed at. * * *
>
> "* * *

"Ladies and gentlemen, this man knows nothing except that he will go on doing what he willfully wants to do unless you stop him, and the only way in which he can be stopped, and that is in his pocketbook. Those are why punitive damages are essential.

"If you award a verdict against Larry Flynt of several hundred thousand dollars above the several hundred thousand dollars of lawyers' fees already expended to make Mr. Guccione whole, do you think that would stop Larry Flynt, a man who has a cash flow that he admits that is more than a million-and-a-half dollars a week? Now, these are sums, I know, astronomical, and outside of the experience of almost all of you, all of us, but that is the reality of the bloated Larry Flynt, a man heaped up on his own ill-gotten success. A modest verdict, he will rear back and roar at you, and will have gotten away with it, and what will happen next month or the month after to Mr. Guccione, to his mother, to Ms. Keeton, to his children, to President Carter?

"• • •

"• • • To anyone whom he may elect to vent his spiteful, vicious ire upon. That is the focus. How do you stop that man? How do you stop him. I have calculated from the figures which the Flynt organization provided to us that of the magazines which were involved in the publications of the specific evils against Mr. Guccione, Mr. Flynt probably made over $10 million, and I could ask you rationally, as a matter of punitive damages, to stop Mr. Flynt by making him pay back the money that he made on this vile pile of Swill."

Plaintiff's counsel then proceeded to argue other publications than the one sued upon in an apparent effort

to connect punitive damages to these publications as well. There were two references concerning financial standing from the foregoing quoted argument which were also inappropriate. Plaintiff's counsel referred to cash flow as having some bearing upon damages. However, any connection between cash flow and profit or net worth is purely speculative since a company with a large cash flow may in actuality operate at a loss or even be bankrupt. Likewise, the proceeds from sales of an issue of a magazine are gross income, not profit as intimated by plaintiff's counsel. The accuracy of the amount stated is not readily apparent from the record.

More important, however, is the fact that this was a designed appeal to the jury to award an amount of punitive damages that would stop defendant Flynt from continuing to operate in the manner he had previously operated with respect to publishing comments concerning people and publishing photographs of them without their consent. See comments of plaintiff's counsel (Tr. 1400-1401). From the totality of the evidence in this case, as well as from the implications of the argument of plaintiff's counsel, the only clear and certain method of deterring and stopping defendant Flynt is to put him out of business. From the totality of the record, this is exactly what the jury attempted to do; that is, put defendant Flynt and defendant Hustler out of business by awarding an amount of punitive damages so great that they no longer could continue to publish such vile magazines. The trial court recognized this in ordering the remittitur, commenting that the purpose of punitive damages is to punish, not to destroy. Where a jury awards punitive damages with the intent of destroying a person or a corporation, rather than merely punishing them for a specific intentionally wrongful and malicious act, the jury has operated under passion and prejudice.

From the totality of this record, it is apparent that plaintiff throughout the trial attempted to appeal to the passion and prejudice of the jury in an effort to enhance the amount of damages to be awarded. Had plaintiff not been successful in this endeavor, there would have been no error. However, under the circumstances of this case, plaintiff was overly successful in his endeavor to appeal to the passion and prejudice of the jury and succeeded in having the jury return a verdict 13 times the amount which the trial court found to be reasonable. This enormous excessiveness of the verdict coupled with the repeated appeals to passion and prejudice can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice, and, accordingly, a new trial must be ordered upon the issue of damages.

While the trial court did not order a remittitur of the compensatory damages, when the verdict was returned, the trial court reduced the verdict from $3,000,000 total compensatory damages to $1,000,000. Considering the verdict as originally returned by the jury, the compensatory damage portion thereof was also influenced by passion and prejudice, as well as confusion on the part of the jury. There is no conceivable basis upon which the jury could properly return a verdict of $1,000,000 in compensatory damages for invasion of privacy or $2,000,000 in compensatory damages for the libel, unless they were influenced by the appeals for passion and prejudice for consideration not only of injuries to plaintiff by the one publication but by other publications and to injuries to other persons as well, including plaintiff's family. We need not determine at this time whether the $1,000,000 compensatory damages to which the trial court reduced the verdict is excessive since no issue has been raised with respect thereto. Nevertheless, because the grossly excessive verdict was influenced by passion and prejudice, there

must be a new trial on the issue of damages, both compensatory and punitive. The eighteenth assignment of error is well taken.

The nineteenth assignment of error is essentially a repetition of other assignments of error. For the reasons noted above, the trial court did not err in overruling defendants' motions for mistrial and judgment n.o.v., nor defendants' motion for new trial with respect to liability. However, the trial court did err in overruling defendants' motion for new trial with respect to the issue of damages. To this limited extent, the nineteenth assignment of error is well taken.

By the twentieth assignment of error, defendants contend that the trial court erred in refusing to grant a continuance because of the ill health of defendant Flynt. We find no merit to this contention. There is no demonstration of any abuse of discretion on the part of the trial court in denying the continuance. The trial had been long delayed, and there was no indication that there would be any time in the future which would be more propitious for trial from the standpoint of defendant Flynt's health. Defendant Flynt is not entitled to an indefinite continuance because of ill health. Also, defendants did not demonstrate any prejudice to his defense resulting from the denial of any further continuances. In addition, we find no indication that defendants at any time sought to have the trial separated so that it would proceed against defendant Hustler but not against defendant Flynt, if this would have been feasible from the court's standpoint, and not be prejudicial to plaintiff. In short, we find no abuse of discretion. The twentieth assignment of error is not well taken.

For the foregoing reasons, the third, fifth, sixth, eighth, tenth, twelfth, fourteenth, fifteenth, sixteenth, seventeenth

and twentieth assignments of error are overruled; the first, thirteenth, and eighteenth assignments of error are sustained; the second, fourth and eleventh assignments of error are sustained in part to the extent indicated; and the seventh, ninth and nineteenth assignments of error are overruled in part and sustained in part as indicated; and the judgment of the Franklin County Court of Common Pleas is affirmed with respect to the issue of liability but is reversed with respect to the issue of damages; and this cause is remanded to that court for a new trial upon the issue of damages.

Judgment reversed in part and affirmed in part and cause remanded.

REILLY and NORRIS, *JJ.*, concur.

JOURNAL ENTRY OF JUDGMENT BY THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

(Filed October 13, 1981)

No. 80AP-375

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE *et al.*,
Plaintiffs-Appellees,

v.

HUSTLER MAGAZINE, INC., *et al.*,
Defendants-Appellants.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on October 8, 1981, the motion to dismiss is overruled, and the objection to the panel change is overruled, assignments of error 3, 5, 6, 8, 10, 12, 14, 15, 16, 17 and 20 are overruled, assignments of error 1, 13, and 18 are sustained, assignments of error 2, 4, and 11 are sustained in part to the extent indicated, and assignments of error 7, 9, and 19 are overruled in part and sustained in part as indicated, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed with respect to the issue of liability except as to the claim for invasion of privacy as to defendant Flynt, but is reversed with respect to the issue of liability upon the claim for invasion of privacy as to defendant Flynt and is reversed with respect to the issue of damages, and this cause is remanded to that court for a new trial upon the issue of damages.

WHITESIDE, REILLY and NORRIS, *JJ.*
By /s/ ALBA J. WHITESIDE
Judge

JOURNAL ENTRY OF THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

(Filed October 15, 1981)

No. 80AP-375

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE, *et al.*,
Plaintiffs-Appellees,

v.

HUSTLER MAGAZINE, INC., AND LARRY FLYNT,
Defendants-Appellants.

JOURNAL ENTRY

The court noting that the decision rendered herein on October 8, 1981, contained a certain clerical error on page twenty-two, line eleven of said decision, it is hereby ordered that the clerk of the Court of Appeals correct such decision by interlineation by deleting the word "defendants' " in such line and to substitute the word "plaintiff's" so that the phrase shall read, ". . . with respect to plaintiff's claim of libel."

/s/ ALBA L. WHITESIDE
Judge

/s/ ARCHER E. REILLY
Judge

/s/ ALAN E. NORRIS
Judge

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

(Filed April 28, 1980)

No. 77CV-04-1692

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE, *et al.*,
Plaintiffs

vs.

HUSTLER MAGAZINE, INC., *et al.*,
Defendants

JUDGMENT ENTRY

Upon defendants' motions for new trial, defendants' motion for judgment notwithstanding the verdict, and defendants' motion for mistrial, and after having considered the arguments and memoranda of the parties, the Court hereby ORDERS:

(1) Defendants' motion for mistrial is without merit, and is hereby overruled;

(2) Defendants' motion for judgment notwithstanding the verdict is without merit, and is hereby overruled;

(3) Defendants' motions for new trial are overruled; provided, however, that a new trial shall be granted to the defendants as to the issue of punitive damages only, unless plaintiff, on or before May 6, 1980, shall, in a writing filed with the Clerk of this Court, remit absolutely or under protest, all punitive damages awarded above the

sum of $2,000,000 against the defendant Flynt, and all punitive damages awarded above the sum of $850,000 against the defendant Hustler Magazine, Inc.

In order to conform to the verdicts of the jury, and to explain the remittitur on punitive damages as to the defendant Hustler Magazine, Inc., and to complete an aspect inadvertently omitted, the Court hereby amends its decision dated April 16, 1980, by deleting the first two paragraphs of IV. on page 10 and substituting therefor the following two paragraphs:

> "Finally, the Court must make an appropriate reduction of the punitive verdicts. From the outset of this litigation I have entertained serious doubts as to whether separate punitive verdicts could be collectible under both causes of action. Should a fine be levied twice for the same act? Should a man be punished twice for the same pattern of conduct because of two theoretically distinct legal injuries? Counsel have provided no persuasive authority supporting an affirmative answer to this question. Happily, the size of the verdicts moots the issue. The Court will remit the punitive verdict on the theory of invasion of privacy as against the defendant Larry C. Flynt to $1.00, since the injury suffered by the malicious libel clearly outweighs that due to the invasion of Mr. Guccione's privacy. The Court will remit the punitive verdict on the theory of libel as against the defendant Hustler Magazine, Inc. to $1.00. Thus, the punitive verdicts, as remitted and as hereinafter stated, will (except for $1.00 as aforesaid) lie on the count of libel against the defendant Larry C. Flynt and on the count of invasion of privacy against the defendant Hustler Magazine, Inc.

Thus, we are left with an allowance of a proper amount with respect to the respective defendants. Mr. Flynt was plainly the architect of the pattern of malice. Hustler Magazine was merely the vehicle for striking the final blow. Thus, Mr. Flynt bears more culpability for the malicious and unprovoked attack on Plaintiff."

With this change, the April 16, 1980 decision of this Court is incorporated herein, in further explanation of the order hereby made.

Exceptions to the parties as their interests may appear.

/s/ CRAIG WRIGHT
Judge

DECISION OF THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO

(Filed April 16, 1980)

Case No. 77CV-04-1692

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE, *et al.*,
Plaintiffs

vs.

HUSTLER MAGAZINE, INC., *et al.*,
Defendants

DECISION

WRIGHT, *J.*

This cause is before the Court on several motions filed by Defendant Larry Flynt and Defendant Hustler Magazine, Inc. Both Defendants have filed motions for a new trial alleging misconduct of Plaintiff's counsel, surprise, excessive damages, verdicts against the weight of evidence, judgments contrary to law, and errors of law during the trial pursuant to Rule 59(A)(2), (3), (4), (6), (7), and (9), respectively. Defendant Flynt has moved for judgment notwithstanding the verdict pursuant to Rule 50(B). Finally, Defendants have renewed their motion for a mistrial, first made orally at trial following Plaintiff's closing argument, claiming irregularities and abuse of the Court's discretion which prevented Defendants from receiving a fair trial, pursuant to Rule 59(A)(1). Defen-

dants' motion for a mistrial is without merit and is hereby OVERRULED.

The Court adopts by reference Plaintiff's review of evidence contained on pages 72 through 77 of his Memorandum Contra Defendants' motions. There is, of course, additional evidence to support the verdicts. The jury obviously rejected the evidence to the contrary, chosing to disbelieve Defendants' witnesses, as it was entitled to do. Defendant Flynt's motion for judgment N.O.V. is OVERRULED. Further, the evidence is simply overwhelming on the twin issues of liability as to Defendant Hustler Magazine, Inc. There are no meritorious grounds for a new trial on liability as to either Defendant for the reasons outlined below.

Defendants' principal complaint is that the punitive damage verdicts were the result of passion and prejudice on the part of the jury. A like complaint is directed toward the compensatory awards.

I.

This case involved libel per se, where damage to the victim's reputation is presumed. *Becker v. Toulmin*, 165 Ohio St. 549 (1956). What was the damage to reputation as a result of being characterized in a magazine claiming a circulation in excess of two million copies (with pass through readership of perhaps four times that number) as a homosexual engaged in anal intercourse with another male? Does the evidence of the humiliation and anguish suffered by Plaintiff, along with the damage to his reputation, support a million dollar compensatory award? Answering in the affirmative, temptation to modify this verdict should be resisted by the Court for the following reasons:

(A) Our system of justice is founded on the concept of trial by jury. Where there is a margin for a reasonable difference of opinion in the matter, the view of the Court should yield to the verdict of the jury. If a case is tried fairly, interference by the judge is unwarranted even though, had he set as a juror, he would not have agreed to so large a verdict. 40 O. Jur. 2d *New Trial*, Section 74 (Rev. Ed., 1967). An exhaustive review of the transcript, coupled with my own recollection of the basic tenor of the proceedings, demonstrates that Defendants received a fair trial. The Court would point out that Defendant Hustler Magazine, Inc. presented no substantive defense to Plaintiff's allegations, relying in large measure on a calculated effort to expose Mr. Guccione's frailties. Obviously, the jury rejected out of hand Mr. Flynt's protestations of non-involvement, accepting Plaintiff's evidence on that issue.

(B) I am personally convinced that the compensatory damage awards were not the result of passion or prejudice. I would point to the meticulous care used to pick the panel and the fact that all eight members of the jury signed the verdicts after lengthy deliberations. Would all eight of these citizens have set aside their respective oaths and have disregarded the Court's written instructions? I think not. As previously indicated (and discussed infra), the record is devoid of any substantial misconduct on the part of Plaintiff's Counsel which might have created an inference of passion and prejudice. Further, any fair minded review of the record militates a finding that it is improbable if not impossible that the jury could have developed a bias in favor of Mr. Guccione.

(C) The libel involved in this action was of the grossest sort, most reprehensible in nature. Regardless of what the writer might think about Plaintiff's sensibilities and

morals, the amount of the compensatory awards is not clearly excessive. Further, it must be noted that the libel struck directly at Plaintiff's cultivated and measured aura of masculinity. There is no way that damages of this sort can be measured in precise terms; accordingly, this matter should be left to the sound discretion of the jury.

II.

The questions raised with respect to the punitive damage verdicts present a more serious problem. The mere fact that a punitive award is too high does not in and of itself require a new trial. The Ohio Rule was definitively stated by the Supreme Court in the Syllabus of *Chester Park Co. v. Schulte*, 120 Ohio St. 273 (1929):

> "2. If a trial court in an action for unliquidated damages finds that the verdict is excessive and that it was rendered under the influence of passion or prejudice, it has no alternative except to set it aside and grant a new trial.
>
> "3. If a verdict in an action for unliquidated damages is, in the opinion of the trial court, excessive, but not appearing to be influenced by passion or prejudice, the court may with the assent of plaintiff reduce the verdict by remittitur to any amount warranted by the evidence."

A verdict which is clearly excessive creates a rebuttable presumption that the jury was influenced by passion or prejudice. *Cleveland Ry. Co. v. Crooks*, 130 Ohio St 255 (1934). However, the amount of the verdict, although it may furnish a suspicion of passion or prejudice, is not in and of itself conclusive proof of that fact. *Fromson & Davis Co. v. Reider*, 127 Ohio St. 564 (1934). Such a presumption may well be present in the case at bar;

however, the Court finds that the record sufficiently refutes and conclusively disproves same.

Defendants make much of their straitened financial circumstances as compared to the punitive verdicts returned herein. The evidence on this score was conflicting and confusing, with Defendant Flynt himself casting doubt on the conservative view now urged upon this Court. Mr. Flynt pointed with pride to the enormous cash flow enjoyed by his company. While I would agree that the punitive verdicts are very high and probably excessive, I do not believe that there was any obvious illegal purpose on the part of the jury in rendering said awards for the reasons noted below. The finding that the jury was not influenced by passion or prejudice is made by this Court only after earnest reflection and thoughtful deliberation, fully aware of the Supreme Court's holding in *Chester Park Co. v. Schulte, supra,* at 282, that:

> "In affirming the judgment of the Circuit Court without opinion this Court in [*Spear & Co. v. Fulton,* 92 Ohio St. 523 (1915)] affirmed the doctrine that the situation is controlled by the court finding or not finding as a fact that the jury was influenced by passion and prejudice."

I do not believe, in the light of the evidence, that the verdicts were at first blush so outrageous or shocking so as to appear totally out of proportion to one's sense of fairness and justice. *Cleveland Ry. Co. v. Smith,* 35 Ohio App. 204 (Cuy. Co., 1928).

A careful review of the record impresses the reader with a definite pattern of unprovoked malice demonstrated by Defendants toward Plaintiff. Certainly, the clear and convincing evidence of such malice could create a sense of righteous indignation in any citizen with normal sensi-

bilities. There is a distinct difference between a verdict premised upon passion or prejudice and one where the *evidence* has evoked the reasonable belief that the perpetrators should be subject to punishment for their deeds.

Defendants further suggest that the punitive damages verdicts were the result of some sort of provincial vengeance. I vigorously disagree. Defendants sought no change of venue, nor did they complain about the Court's thorough instructions to the jury as to the purpose of punitive damages. This Court specifically charged the jury that:

> "Punitive damages . . . are an amount which the jury may, but is not required to, award to a plaintiff as punishment to the defendant or defendants to discourage them, him, or others from committing similar acts. . . .
>
> "If you award punitive damages the amount should be fair and reasonable under all the facts and circumstances of this case and must bear some reasonable relation to the harm done. It should not be excessive, nor actuated by any feelings of passion or prejudice.
>
> "The amount of punitive damages rests in the sound discretion of this jury, and should be determined from all of the evidence in this case, including the evidence concerning the economic status of the defendant, and the circumstances surrounding the alleged invasion of plaintiff's privacy."
>
> • • • • •
>
> "Punitive damages mean damages by way of punishment, and are not to be measured by the extent of the injury. Punitive damages are given as monetary punishment to make an example, not only

for the benefit of the plaintiff, but also for the public good and for the purpose of preventing others from a repetition of like or similar conduct as to another person similarly situated . . . punitive damages, if you in your discretion award them, are to be assessed in accordance with what would be appropriate financial punishment to one or both of these defendants in question in light of their financial ability to pay, in light of the gravity and under all the circumstances. Thus, for the same wrong, you would not award substantial punitive damages against a defendant of limited means, to the same extent you would against a defendant with greater financial capacity.

"If punitive damages are warranted, I charge you they are to be assessed according to the nature and severity of the wrong, and the other considerations I've touched on. They are not to be measured or diminished on account of the plaintiff's affluent financial status."

No instructions were suggested or given (or would have been appropriate) as to the scope of punitive damages with respect to a maximum amount or any quantitative limitation. *State v. Cameron*, 91 Ohio St. 50 (1914), 16 O. Jur. 2d *Damages*, Section 166 (Rev. Ed., 1971). Thus, it cannot be said that the jury lost its way since there was no delineation of parameters mandated by the common law.

The verdicts do exceed the net worth of both Defendants. However, the record is quite clear that Defendant Hustler Magazine, Inc. earned in excess of $11,000,000.00 pre tax in 1979. The magazine was a notable financial success in prior years, but substantial lossess in unrelated activities coupled with massive reserves for contingencies have held Hustler Magazine, Inc. to a net worth of approx-

imately 5.2 million dollars according to the unaudited figures at year end 1979. The deposition of Mr. Flynt's accountant reflects a far stronger company in terms of its ability to generate cash or obtain credit toward the payment of a judgment in excess of its net worth. In any case, there is little doubt that the magazine has been earning and will continue to earn profits of at least one million dollars per month pre tax on the near term. The true value of such an enterprise should certainly approximate somewhere between 6 to 10 times its yearly earnings. Such an anlysis would certainly not be beyond the ability of a reasonable sophisticated jury.

It is quite obvious that as a going business Hustler Magazine, Inc. is worth, at a minimum, 30 to 50 million dollars. Defendant Flynt's remarks concerning his own net worth were most accurate. As sole stockholder of L.P.F., Inc. he enjoys a vast personal income, and is a millionaire many times over. It may be that the jury concluded that Defendant, Hustler Magazine, Inc. should be punished to the tune of its earnings in 1979. In light of the magazine's overall financial circumstances this sum would be inappropriate, but it certainly doesn't demonstrate a vengeful or evil purpose on the part of the jury. Be that as it may, neither counsel for Plaintiff nor the writer has found a single case akin to this one approving a punitive damages verdict which would in effect render a defendant bankrupt. Punitive damages are designed to punish, not bankrupt, the offender. *Simpson v. Pitman*, 13 Ohio Reports 365 (1844), *Gray v. General Motors Corp.*, 52 Ohio App. 2d 348 (Cuy. Co., 1977). Thus, while this Court agrees with the jury's obvious purpose to set an example that will deter Defendants and others from a repetition of the conduct found here, these verdicts must be subject to remittitur.

III.

Defendants also complain that they were victims of "surprise" by Plaintiff's testimony concerning his youngest son's unpleasant encounter with the libelous publication. This post trial suggestion comes too late, since absolutely no effort was made to apprise the Court of their posture at a time when possible relief could be afforded by way of a deposition or other discovery.

Defendants now complain that Plaintiff's outbursts during their cross-examination of him prejudiced their defense. Such an assertion borders on hypocrisy since eliciting such was one of their principal purposes.

Defendants make the remarkable suggestion that somehow Plaintiff's lead counsel, Norman Roy Grutman, wore the Court down with his single-minded advocacy and combative demeanor. To the contrary, the record is a tight one. Admittedly, the Court was forced to maintain a tight rein on Mr. Grutman; however, *all* of the lawyers pressed the Court to the limit on the difficult evidentiary issues posed during trial. This was a "hard ball" trial. There is a fine line between forceful advocacy and unfair tactics. It is my carefully considered opinion that this line was rarely, if ever, crossed during the recorded proceedings. In a word, I was neither attracted to, nor intimidated by Plaintiff or his coterie of lawyers. The plain truth of the matter is that Defendants were successful on most of the close questions with respect to the substantive law, all to the great discomfiture of Plaintiff and his counsel.

IV.

Finally, the Court must make an appropriate reduction of the punitive verdicts. From the outset of this

litigation I have entertained serious doubts as to whether separate punitive verdicts could be collectible under both causes of action. Should a fine be levied twice for the same act? Should a man be punished twice for the same pattern of conduct because of two theoretically distinct legal injuries? Counsel have provided no persuasive authority supporting an affirmative answer to this question. Happily, the size of the verdict moots the issue. The Court will remit the punitive verdict on the theory of invasion of privacy to $1.00 since the injury suffered because of the malicious libel clearly outweighs that due to the invasion of Mr. Guccione's privacy.

Thus, we are left with an allowance of a proper amount with respect to the respective Defendants on the libel count. Mr. Flynt was plainly the architect of the pattern of malice. Hustler Magazine was merely the vehicle for striking the final blow. Thus, Mr. Flynt bears more culpability for the malicious and unprovoked attack on Plaintiff.

Defendants contend that Mr. Flynt and Hustler Magazine, Inc. are essentially the same entity and, therefore, each should not be punished separately for the same act. Defendant Flynt argues that a substantial punitive damages verdict against Hustler Magazine, Inc. will (if and when paid) greatly deplete its net worth and thereby punish him by reducing the value of his assets, the stock in the corporation. He submits that allowing a separate punitive damages award against him personally would be punishing *him* twice for the same act. Be that as it may, the law clearly provides for exemplary damage awards against two or more defendants who have been found to have acted in concert with actual malice. *Mauk v. Brundage, et al.*, 68 Ohio St. 89 (1903). The Court holds that Defendant Flynt and Defendant Hustler Magazine,

Inc. are separate and distinct entities, each subject to a punitive damages verdict for the injuries to Plaintiff perpetrated by the two Defendants acting in concert.

However, Plaintiff's suggestion that the amounts of the verdicts are appropriate flies in the face of reason. The concept of punitive damages has its roots in the Old Testament. But from that time throughout history the law has tempered punishment with reason and a certain degree of mercy. A punitive verdict of $2,000,000.00 against Defendant Flynt and $850,000.00 against Defendant Hustler Magazine, Inc. might appear harsh to one person and lenient to another. As the conscience of this community, the jury obviously intended to levy the maximum fine allowable for Defendants' lawless behavior. The Court finds that the amounts set forth above are supported by the evidence, reasonable, and legally permissible under the unique circumstances of this case.

The remittitur noted above moots any constitutional arguments premised upon First Amendment considerations, and keeps intact the individual and the State's right to punish defamatory falsehood and protect the private personality. All other issues raised by Defendants having been considered by the Court are found to be without merit and warrant no further comment by the Court.

Having determined that the punitive verdicts are excessive, this Court has the power, with the assent of Plaintiff, to order a remittitur in lieu of granting a new trial on the issue of punitive damages only. *Chester Park Co. v. Schulte, supra,* Rule 59(A). Consequently, Plaintiff has the option of agreeing to the remittitur or, by refusing, forcing the Court to sustain Defendants' motion for a new trial. Such an option is illusory in that a similar verdict for Plaintiff upon retrial could not logically be sustained,

the amount having previously been judicially deemed excessive. *Collins v. Retail Credit Co.*, 410 F. Supp. 924 (E.D. Mich., 1976).

For all of the above reasons, Defendants' motions for a new trial are hereby OVERRULED. However, a new trial shall be granted as to the issue of punitive damages only unless Plaintiff, within twenty (20) days of the date of this Decision, shall, in a writing filed with the Clerk of this Court, remit either absolutely or under protest all of the punitive damages awarded above the sum of $2,000,000.00 as against Defendant Flynt and all of the punitive damages awarded above the sum of $850,000.00 as against Defendant Hustler Magazine, Inc. The verdict for Plaintiff in the amount of $1,150,000.00 in compensatory damages against Defendants jointly and severally shall remain undisturbed.

Entry pursuant to Court Rule 39.01.

/s/ CRAIG WRIGHT
Judge

COVER PAGE AND ITEMIZATION OF ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Case No. 80AP-375

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE, *et al.*,
Plaintiff-Appellee,

vs.

HUSTLER MAGAZINE, INC., *et al.*,
Defendants-Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

ASSIGNMENT OF ERROR NO. 1

PLAINTIFF WAS ERRONEOUSLY PERMITTED TO TESTIFY THAT HE FEARED FUTURE PUBLICATIONS FEATURING OTHER MEMBERS OF HIS FAMILY.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT COMMITTED ERROR IN PERMITTING PLAINTIFF TO READ TO THE JURY THE TRANSCRIPT OF DEPOSITION OF THE DEFENDANT FLYNT AS UPON CROSS-EXAMINATION ONLY, AND IN LETTING BE READ CLEARLY IRRELEVANT AND HIGHLY PREJUDICIAL AND INFLAMMATORY PORTIONS THEREOF.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT COMMITTED PLAIN ERROR IN EXCLUDING OBJECTIVE EVIDENCE SOUGHT AND/OR OBTAINED UPON CROSS-EXAMINATION OF THE PLAINTIFF, AND EXHIBITS OFFERED BY THE DEFENDANTS WHICH ESTABLISHED SUBSTANTIVE DEFENSES TO THE PLAINTIFFS' CLAIMS, AND DEMONSTRATED A DIMINUTION OR TOTAL ABSENCE OF DAMAGE TO THE PLAINTIFF OR ENTITLEMENT TO A PUNITIVE AWARD.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED IN ADMITTING HIGHLY PREJUDICIAL AND IRRELEVANT EVIDENCE RELATED TO DEFENDANT LARRY FLYNT'S ALLEGED CHARACTER.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED IN PERMITTING THE PLAINTIFF'S TESTIMONY CONCERNING THE ALLEGED INJURY TO HIS SON NICHOLAS TO GO TO THE JURY ON THE BASIS THAT SUCH TESTIMONY WAS HIGHLY INFLAMMATORY, EMOTIONAL AND PREJUDICIAL; WAS IN DIRECT CONFLICT WITH THE PLAINTIFF'S DEPOSITION TESTIMONY, AND WAS BASED IN PART ON EVIDENCE TO WHICH THE DEFENDANT HAD BEEN DENIED ACCESS BY THE TRIAL COURT.

ASSIGNMENT OF ERROR NO. 6

MISCONDUCT OF PLAINTIFF'S CO-COUNSEL THROUGHOUT THE TRIAL PREJUDICED THE JURY, PREJUDICIALLY INTERFERED WITH THE ABILITY

OF THE COURT TO CONTROL THE PROCEEDINGS, AND DENIED DEFENDANTS THEIR CONSTITUTIONAL RIGHT OF CROSS-EXAMINATION.

ASSIGNMENT OF ERROR NO. 7

THE VERDICTS OF THE JURY RENDERED AGAINST DEFENDANT FLYNT IN LIBEL AND STATUTORY INVASION OF PRIVACY ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 8

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW THE DEFENDANTS TO PRESENT EXPERT TESTIMONY ON THE TOPICS OF HUMOR AND SATIRE.

ASSIGNMENT OF ERROR NO. 9

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT FLYNT'S MOTIONS TO DISMISS MADE IN OPEN COURT AT THE CLOSE OF PLAINTIFF'S CASE-IN-CHIEF AND AT THE CLOSE OF TRIAL.

ASSIGNMENT OF ERROR NO. 10

THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR MISTRIAL MADE AT CLOSING ARGUMENT OF PLAINTIFF'S COUNSEL.

ASSIGNMENT OF ERROR NO. 11

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST HUSTLER FOR VIOLATION OF SECTION 51, N.Y.C.R.L. AND IN PERMITTING AN AWARD TO BE BASED UPON PROOF OF ALLEGED DAMAGE OTHER THAN "PUBLICITY VALUE".

ASSIGNMENT OF ERROR NO. 12

THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF DETERMINING WHETHER OR NOT THE PUBLICATION AT ISSUE CONSTITUTED LIBEL *PER SE*, AND THEN DEFINING "ACTUAL MALICE" AS PUBLISHING FALSELY, "FABRICATED" MATERIAL WHICH WAS THE "PRODUCT OF THE DEFENDANT'S IMAGINATION."

ASSIGNMENT OF ERROR NO. 13

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT DEFENDANT FLYNT COULD BE FOUND PERSONALLY LIABLE IN DAMAGES TO THE PLAINTIFF UNDER THE THEORY OF INVASION OF PRIVACY MERELY UPON ALLEGED EVIDENCE THAT HE HAD "RESUMED CONTROL" OF HUSTLER MAGAZINE, INC., FOLLOWING HIS NEAR-FATAL SHOOTING, BEFORE PUBLICATION OF THE JUNE, 1979, ISSUE OF *HUSTLER*.

ASSIGNMENT OF ERROR NO. 14

THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY THAT EVIDENCE OF ALLEGEDLY DEFAMATORY STATEMENTS OTHER THAN THOSE ACTUALLY SUED UPON, IS NOT ADMISSIBLE TO AGGRAVATE OR ENHANCE DAMAGES, CONTRARY TO THE WRITTEN REQUEST TO COURT FOR CHARGE TO JURY FILED BY THE DEFENDANTS.

ASSIGNMENT OF ERROR NO. 15

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO AWARD THE PLAINTIFF ATTORNEY FEES BASED UPON *INSUFFICIENT AND IMPROPER EVIDENCE*.

ASSIGNMENT OF ERROR NO. 16

THE FAILURE OF THE TRIAL COURT TO GIVE CAUTIONARY INSTRUCTIONS OR A CHARGE TO THE JURY WITH RESPECT TO THE WEIGHT OF THE FLYNT DEPOSITION AND HIS LIVE TESTIMONY ON CROSS-EXAMINATION CONSTITUTES REVERSIBLE ERROR.

ASSIGNMENT OF ERROR NO. 17

THE JURY VERDICTS WERE FATALLY INCONSISTENT AND DEFECTIVE.

ASSIGNMENT OF ERROR NO. 18

THE TRIAL COURT ERRED IN DENYING A NEW TRIAL ON DEFENDANTS' POST TRIAL MOTIONS BASED ON THE VERDICTS OF AN IMPASSIONED AND PREJUDICED JURY WHILE REMITTING A $26,000,000 PUNITIVE VERDICT AGAINST LARRY FLYNT TO $2,000,000 AND AN $11,000,000 PUNITIVE VERDICT AGAINST HUSTLER, INC. TO $850,000.

ASSIGNMENT OF ERROR NO. 19

THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT'S MOTIONS FOR NEW TRIAL, MISTRIAL AND JUDGMENT N.O.V.

ASSIGNMENT OF ERROR NO. 20

IT WAS AN ABUSE OF DISCRETION FOR THE COURT PRIOR TO TRIAL TO RULE THAT NO FURTHER CONTINUANCES OF TRIAL WOULD BE GRANTED FOR THE REASON OF THE ILL HEALTH OF DEFENDANT LARRY FLYNT, WHICH RESULTED IN MATERIAL PREJUDICE TO HIS DEFENSE.

COVER PAGE AND ITEMIZATION OF PROPOSITIONS OF LAW PRESENTED FOR REVIEW BY THE SUPREME COURT OF OHIO

Case No.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE,
Plaintiff-Appellee,

v.

HUSTLER MAGAZINE, INC., *et al.*,
Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION
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PROPOSITION OF LAW NO. 1

IN THE CONTEXT OF A LIBEL AGAINST AN ALL-PURPOSE PUBLIC FIGURE, COMPENSATORY AND PUNITIVE DAMAGES CANNOT BE ASSESSED AGAINST AN OFFICER OR DIRECTOR OF THE CORPORATION THAT PUBLISHED THE MAGAZINE IN WHICH THE ALLEGEDLY LIBELOUS CARTOON WAS PUBLISHED, WHERE THE EVIDENCE DOES NOT ESTABLISH THAT SAID OFFICER OR DIRECTOR HAD KNOWLEDGE OF THE CONTENTS OF THE CARTOON PRIOR TO ITS PUBLICATION, OR OF ITS EXISTENCE

PROPOSITION OF LAW NO. 2

WHETHER A SATIRICAL CARTOON OF AN ALL-PURPOSE PUBLIC FIGURE IS A LIBEL PER SE IS NOT A DETERMINATION TO BE MADE BY THE JURY

PROPOSITION OF LAW NO. 3

A JURY VERDICT OBTAINED AS A RESULT OF A DIRECT APPEAL TO THE PASSION AND PREJUDICE OF THE JURY BY COUNSEL IN HIS CLOSING ARGUMENT, AND AS A RESULT OF PREJUDICIAL MISCONDUCT BY THE SAME COUNSEL THROUGHOUT THE TRIAL PROCEEDING, IS NOT VALID AND MUST BE VACATED

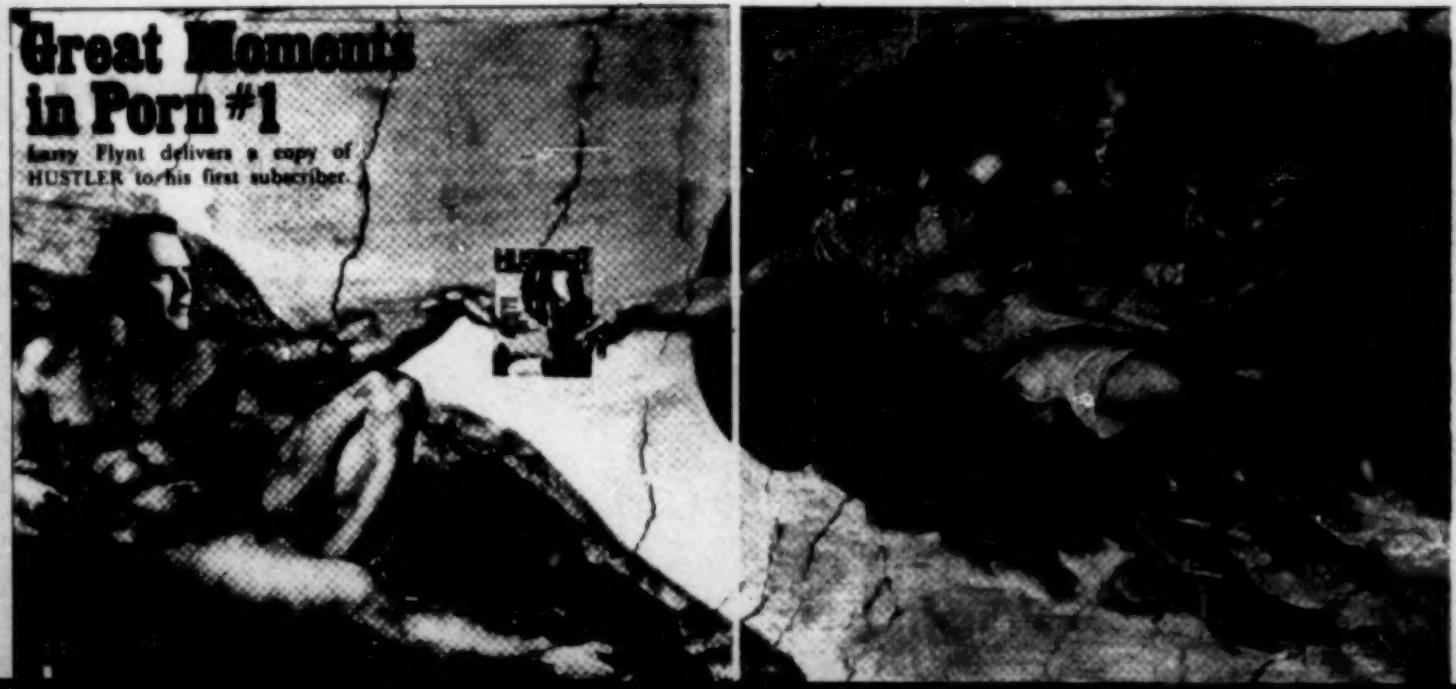
PROPOSITION OF LAW NO. 4

JURY VERDICTS THAT AWARD PUNITIVE DAMAGES UNDER LIBEL AND INVASION OF PRIVACY CLAIMS ON WHICH NO COMPENSATORY OR NOMINAL DAMAGES ARE AWARDED ARE DEFECTIVE AND INVALID

PROPOSITION OF LAW NO. 5

A FINDING THAT A CARTOON IS "FICTITIOUS" OR "FABRICATED" IS NOT A PROPER SUBSTITUTE FOR THE CONSTITUTIONALLY REQUIRED FINDING OF "ACTUAL KNOWLEDGE" OR "RECKLESS DISREGARD" IN THE CONTEXT OF A LIBEL ACTION BROUGHT BY AN ALL-PURPOSE "PUBLIC FIGURE"

CARTOON PUBLISHED IN APRIL, 1979
ISSUE OF HUSTLER



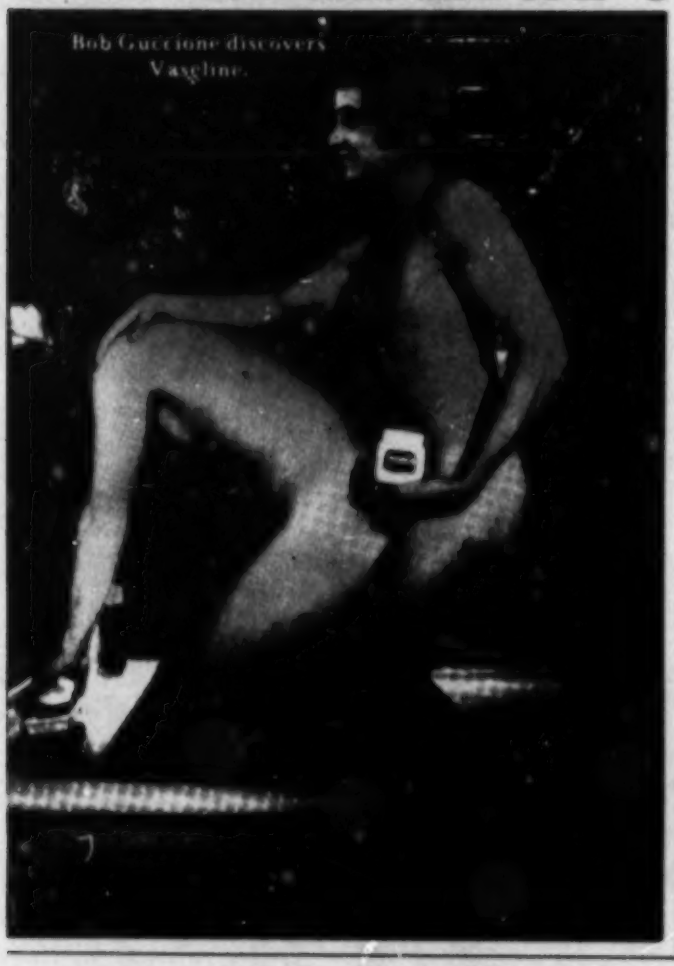
A71

CARTOON PUBLISHED IN MAY, 1979 ISSUE OF HUSTLER

A72

CARTOON PUBLISHED IN JUNE, 1979 ISSUE OF HUSTLER

Great Moments in Porn #3



DECISION OF COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO UNDER WHICH RESPONDENT WAS DECLARED A PUBLIC FIGURE

(Rendered November 23, 1979)

Case No. 77CV-04-1692

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE,*et al.*,
Plaintiffs,

vs.

HUSTLER MAGAZINE, INC., *et al.*,
Defendants.

DECISION

Defendants Hustler Magazine, Inc. and Larry Flynt have filed various motions for summary judgment and partial summary judgment which raise several interrelated issues. The Court will treat the motions as a package.

As a procedural prologue, there has been some discussion in the memoranda of counsel of a differing summary judgment analysis when First Amendment interests are involved. The Court would note that the Tenth District Court of Appeals has been both stringent and consistent in its interpretation of Civil Rule 56 and its requirement that summary judgment not be granted if there are *any* genuine issues of material fact present in the case. First Amendment considerations and interests only become applicable in a determination of whether a party is entitled to judgment as a matter of law. See *Meeropol vs. Nizer*, 381 F.Supp. 29 (SONY 1974) and *Grant vs. Esquire*, 367 F.Supp. 876 (SONY 1973), which indicate summary judgment is a "favored" method of resolution of libel cases.

The initial question for determination is the status of Plaintiffs Robert Guccione and Kathy Keeton as "public figures" as that term has been defined by the United States Supreme Court in *Curtis Publishing Co. vs. Butts*, 388 U.S. 130 (1967), *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Time, Inc. vs. Firestone*, 424 U.S. 448 (1976). Trying to extract a litmus test definition as to who is a public figure from these and other reported cases is a formidable task.

Perhaps the most that can be safely said is that a former football coach is a public figure, while prominent lawyers and wealthy socialites are not. The *Firestone* case follows the opinion of the Court in *Gertz* by reiterating the test as follows:

> "For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Firestone, supra* at 453, quoting *Gertz*, 418 U.S. at 345.

One difficulty which this Court perceives in the Supreme Court's opinions in these cases is that the "affairs of society" and "public controversies" referred to are at the very least implicitly political in nature. The Supreme Court has discussed public figures in a context of the historical First Amendment right to debate about or even criticize government. The Court has not clearly delineated whether apolitical matters of discussion and debate such as sexual morality are matters that would constitute controversies for the purposes of determining an individual's status as a public figure.

The closest approach to an applicable test may be found in *Gertz, supra* at P. 352 where Justice Powell states for the majority:

> "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

This test has been followed and applied in *Hutchinson vs. Proxmire*, 99 S.Ct. 2675 (1979) and *Wolston vs. Reader's Digest Association, Inc.*, 99 S.Ct. 2791 (1979).

Based upon this language, the Court has no hesitancy in ruling that Plaintiff Keeton is not a public figure. The depositions and exhibits show that she does not have general fame or notoriety and that she has taken few, if any, steps to inject herself into public controversy. Her position is more nearly analogous to the plaintiffs in *Hutchinson* and *Wolston, supra*, where, in large measure, plaintiff's notoriety was a result of the alleged defamatory attack itself.

The question as to Plaintiff Guccione is a closer one. However, the Court is prepared to risk "the perils of prophecy" and hold that Robert Guccione is a public figure for all purposes within the meaning of *most* of the reported case law. Plaintiff Guccione does have a substantial amount of media access, through his own and other publications and through a variety of public appearances, and has a familiarity with the media and the methods of obtaining personal publicity. As noted in *Hutchinson*, 99 S.Ct. 2675 at P. 2688:

"regular and continuing access to the media . . . is one of the accoutrements of having become a public figure."

Further, Plaintiff Guccione has voluntarily entered the area of discussion and debate on the alleged joys of unfettered sexuality of almost any form accompanied by an unrelenting attack on biblical precepts of sexual morality through his wholly owned publications and other avenues of public expression. His publications also have dealt at length with political controversy. Plaintiff Guccione did not obtain the recognition he has as a result of the alleged defamatory publications in this case. Guccione has widespread business and financial interests which have led to a substantial amount of public notoriety.

Turning to the other facets of the motions, there exist genuine issues of material fact as to the responsibility of Defendant Flynt for various alleged defamatory matters. This situation is true because of questions concerning the two month lead time between final editorial decisions and publication, the status of administrative editorial safeguards to prevent defamation and the exact status of Defendant Flynt's physical condition after the March 8, 1978 shooting. The Court specifically notes that there is dispute at to Defendant Flynt's physical capacity to function, despite what can best be described as common knowledge that Mr. Flynt was in extremis for a substantial period of time after the shooting incident in Georgia and totally disabled for some period of time following his transfer from a Georgia hospital to Dodd Hall at University Hospital. Yet, his magazine's certified financial statements contain comments concerning Mr. Flynt's return to corporate service which indicate a much earlier return to active management than the writer would have thought possible, given the public reports on his physical circumstances. Accordingly, the Court believes that a factual dispute exists

that must be resolved at trial as to Flynt's role during the time frames involved.

The Court also holds that jury questions are presented on the matter of the admittedly false statement that the Von Zmuda litigation "was still pending." While *Cox Broadcasting Corp. vs. Cohn*, 420 U.S. 469 (1975) most certainly provides First Amendment protection to reporting of judicial proceedings, the protection in *Cohn* extended to a truthful report. Sua sponte, the Court questions the efficacy "still pending" statement and in light of the presence or absence of any request for publication of a retraction under R.C. §§ 2739.13 and 2739.14. See also R.C. § 2317.05. See also 120 ALR 1236 as to the application of the privilege to garbled, inaccurate or mistaken reports of judicial proceedings. Since the issue of Defendants' malice on this issue is hotly disputed, the issue of a privilege on the basis of "fair and impartial report" may well pose a jury question. The matters of context and innuendo may well raise jury issues on the point of whether the "still pending" false statement is in fact defamatory. In any case, the report and its falsity is probably admissible in evidence on other grounds.

Defendant Flynt's motion for judgment on the pleadings is OVERRULED as it has no merit. The Court adheres to its ruling on May 15, 1978 that Count I of Plaintiffs' Second Amended Complaint is barred by the one year statute of limitations as to libel, but Count II is not barred as to the tort of invasion of privacy as a two year statute applies. The Court therefore OVERRULES Defendants' motion for summary judgment as to Count II and SUSTAINS the motion as to Count I.

Counsel shall file proper Judgment Entry pursuant to Court Rule 39.01.

/s/ CRAIG WRIGHT
Judge

TRANSCRIPT OF INSTRUCTIONS TO JURY GIVEN BY COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

No. 77CV-04-1692

FRANKLIN COUNTY COMMON PLEAS COURT
STATE OF OHIO

ROBERT C. GUCCIONE, *et al.*,
Plaintiffs,

vs.

HUSTLER MAGAZINE, INC., *et al.*,
Defendants.

INSTRUCTIONS TO JURY

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[1] Ladies and gentlemen, you have heard all of the evidence and have heard the arguments of counsel. It is now the duty of the court to instruct you on all of the law which may be applicable to this case.

Now, ladies and gentlemen, at the outset I explained that the court and the jury have separate functions. It is up to you to decide the disputed facts and it is up to me to provide you with appropriate instructions of law. It is your sworn duty to accept these instructions as they are given to you and to apply them in the course of your [2] deliberations. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

Now, ladies and gentlemen, generally speaking, a person who claims that certain facts exist must prove them by a preponderance of evidence. This obligation is known as a burden of proof.

In this case, the burden of proof is upon the plaintiff to prove facts necessary for his case, by a preponderance of evidence.

There will be another standard of proof in connection with the concept of malice, and that is that plaintiff must prove the concept of actual malice by clear and convincing proof. I will touch upon this matter later during the course of this charge.

Also, later during the course of this charge I will outline and explain the factual issues and elements of the plaintiff's case, each of which must be proved by a preponderance of evidence, in the case of malice, as indicated, by clear and convincing evidence.

Now, as I indicated at the outset of this case, a preponderance of the evidence is simply the greater weight of the evidence. That is to say, evidence that you believe, because it outweighs or [3] overbalances, in your minds, the evidence that is opposed to it.

A preponderance means evidence that is more probative, more persuasive, more probable.

You may not resort to guesswork, speculate, or pick between equal possibilities on any phase of this case. The law deals in probabilities and not possibilities.

It is the quality of the evidence that must be weighed, and quality may or may not be identical with quantity, that is to say, the greater number of witnesses, or the length of their testimony.

In determining whether an issue has been proved by a preponderance, you should consider all of the evidence, regardless of what side produced it, and if the weight of the evidence is equally balanced, or if you are unable to determine which side of an issue has the preponderance,

then the party who has the burden of proof has not established such issue by a preponderance of the evidence.

Now, what is evidence? Evidence is all of the testimony received from the witness stand, exhibits which you will have with you back in the jury room, and any stipulations of fact agreed upon by and between counsel, and matters that the court [4] requires you to find as facts.

Evidence falls into two broad categories: direct evidence and circumstantial evidence.

Direct evidence is the testimony given from the witness stand or read by way of a deposition, whereby a person who has seen or heard the facts to which he or she testifies to. It includes the exhibits.

Circumstantial evidence, however, is like direct evidence, because it, too, involves the testimony of a witness telling what he or she has seen or heard. It is proof of facts or circumstances from which you may reasonably infer the facts and circumstances which constitute the elements of this case.

To infer or make an inference is to reach a reasonable conclusion or deduction which you may, but are not required to, make. Whether an inference is made rests entirely with you.

I might point out that you may not draw one inference from another inference.

Evidence does not include the statements of the lawyers during the course of trial, unless such statements were an admission or stipulation.

Opening statements and closing arguments [5] are not evidence. Closing arguments and opening statements are designed to give you, in the first case of opening

statements a preview, and in the closing arguments they are designed to persuade you as to the evidence meanings, but I repeat, neither closing arguments nor opening statements are evidence, period.

Now, during the course of this trial, in a number of instances, the testimony of a witness in some particular or a statement made by one of the attorneys was stricken by the court. You are instructed to disregard those things which were stricken. You must treat those matters as though you never heard them, and I know this is difficult. However, we rely upon your honesty and integrity to do so.

These matters were not proper for your consideration, or the court would not have stricken them. If we could not depend on this, we would have no alternative but to start the trial all over again. Therefore, we must rely upon you in great measure to follow these instructions.

Again, I would stress that you must decide this case only on what has been testified to from the witness stand, the stipulations and the exhibits. [6] You must not decide this case on any impressions that you may have had on anything outside of what you heard in the courtroom, and what you will have with you back in the jury room.

Certain objections were sustained, others were overruled. When objections were overruled the witness was permitted to answer, and you heard the testimony of the witnesses. Where the objection was sustained, the witness was not permitted to answer.

Ladies and gentlemen, you must not speculate on why the court sustained some objection to some particular question, or what the answer to that question might have been had the witness been permitted to answer. You

must not draw any inference or speculate on any suggestion included in a question that was not answered.

Now, to determine the preponderance or greater weight of the evidence, you must consider the credibility or the believability of the witnesses and to do this you will apply the test of truthfulness, which you apply in your own daily lives. These tests include the appearance of each witness upon the stand, his or her manner of testifying, the reasonableness of the testimony, the opportunities that he or she had to see, hear, and know the things [7] which he or she testified to, the witness's accuracy of memory, the witness's frankness or lack of it, the witness's intelligence, or any conflicting statements made by the witness.

You may consider the witness's interest and bias, if any, together with all of the facts and circumstances surrounding the testimony.

Applying these tests, you will apply and assign to the testimony of each witness such weight as you, the jury, deem proper.

Now, you are not required to believe the testimony of any witness simply because he or she is under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province, ladies and gentlemen, to determine what testimony is worthy of belief and what testimony is not worthy of belief.

In the case before you, the plaintiff, Robert C. Guccione, has filed suit against the defendants, Hustler Magazine, Inc. and Larry C. Flynt, based upon the publication found in the June, 1979 issue of Hustler, which is marked plaintiff's exhibit A. This publication contained a photographic head of Robert C. Guccione superimposed over another photographic likeness of a male body. This exhibit

[8] has been admitted into evidence and will be available for your review in the jury room.

The plaintiff has filed two claims based upon plaintiff's exhibit A. One claim is based upon the law of libel, and the other is based upon the law of invasion of privacy.

At the outset I should tell you that every man is presumed to have a good reputation. Individual acts of alleged misconduct may not be used to prove bad reputation.

You will recall that during the presentation of evidence I earlier gave you a limiting charge on the restricted purpose certain proof was received concerning various news stories, articles or references to Mr. Guccione, including various magazines published by his company.

I charge you again that such evidence was not, and cannot be considered as evidence of bad character or bad reputation. Furthermore, such evidence cannot be the basis for any inference by you that Mr. Guccione has a bad character or questionable reputation.

During the course of the cross-examination of the parties and witnesses in this case, the court has allowed, among other things, your [9] consideration of the testimony and statements made by Mr. Guccione and Mr. Flynt, including certain of their opinions, and certain of their actions that have been admitted for, among other things, the following limited purposes: one, to test the witnesses' credibility and truthfulness; secondly, for the purpose of reducing or increasing the damages allegedly suffered by reason of the publication complained of. It should be noted that the plaintiff claims, among other things, damage by way of being subjected to public contempt, injury to his feelings, shame, ridicule and disgrace. Cross was used to attempt to refute the elements of Mr. Guccione's claim

for damages under both claims. Cross of Mr. Flynt was used to prove, in part, the elements of plaintiff's own case.

Plaintiff was allowed to introduce numerous exhibits in addition to plaintiff's exhibit A, all of which you will have with you back in the jury room, to attempt to prove, among other things, that the publication of plaintiff's exhibit A was done maliciously, with knowledge of the matter's falsity.

Now, ladies and gentlemen, this case involves claims of invasion of privacy and libel [10] arising out of a single publication which has been marked as indicated as exhibit A. This case does not involve, for lack of a better description, the issue of the tastefulness or the distastefulness of the Hustler Magazine in general, or the Penthouse Magazine in general.

I will first deal with the issue of the claim of invasion of privacy. Under New York law, specifically section 51 of the New York code, one finds the following language:

"Any person whose name, portrait or picture is used within the state for advertising [11] purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

I charge you that the evidence in this case demonstrates that plaintiff resides in the state of New York and that the Hustler Magazine containing plaintiff's exhibit A was distributed in the state of New York as elsewhere, and that as indicated, New York is the locale in which plaintiff lives.

I further charge you that it has been stipulated that plaintiff's exhibit A does contain the name and photograph of plaintiff, that the defendants did not obtain Mr. Guccione's written consent prior to the publication of plaintiff's exhibit A, and the publication was made for the [12] purpose of trade. And I charge you that the publication served no legitimate newsworthy purpose.

I therefore charge you that plaintiff is entitled to a verdict in his favor on his claim for invasion of privacy against defendant Hustler Magazine, Incorporated.

As to Larry Flynt, you, the jury, must decide. If the use of plaintiff's name and photograph in plaintiff's exhibit A was in violation of the law as I have read to you.

You must decide whether or not defendant Larry Flynt was involved in the decision to use plaintiff's name and photograph in the June 1979 Hustler Magazine which contains plaintiff's exhibit A.

This is plaintiff's burden to prove this proposition by a preponderance of the evidence.

Your attention is directed to the conflicting evidence as to whether or not Mr. Flynt had resumed control of the publication of the magazine, Hustler, before the publication of plaintiff's exhibit A. If you decide that defendant, Larry Flynt, caused the use of plaintiff's name and photograph by publishing plaintiff's exhibit A in the June 1979 edition of Hustler, then you must return [13] a

verdict in favor of the plaintiff and against defendant Larry Flynt, on this count.

However, if you decide that Mr. Flynt was not involved in or caused the use of Mr. Guccione's name and photograph, then I instruct you to return a verdict for defendant Larry Flynt.

Having resolved the issue of liability with respect to the issue of invasion of privacy, you must then turn to the issue of damages, and it will then be your duty to determine the measure of damages, if any, which will compensate the plaintiff for those injuries proximately caused by one or both of the defendants' actions to date.

Plaintiff should be neither undercompensated nor overcompensated. Ordinarily the injured party in a case of this nature must prove that he suffered a particular type of injury and prove the pecuniary or monetary value thereof.

I charge you that a plaintiff may be entitled to receive substantial damages in an amount which will compensate him for the humiliation, embarrassment, and mental anguish which he has experienced to date, as a direct proximate result of the publication marked exhibit A.

Substantial damages are damages of real worth [14] or importance, or considerable value, as opposed to nominal damages which are assessed to satisfy a bare legal right.

I have used the phrase proximate cause. A proximate cause is when the injury directly relates to the act as to cause and effect. Once having resolved the issue of liability to Mr. Flynt and Hustler Magazine, you may award compensatory damages, nominal damages, and punitive damages, depending upon your findings with respect to issues which I will now cover.

As I have indicated, there are three types of damages. The first type of damages is referred to as compensatory damages. These are damages which may be awarded to compensate plaintiff for the damage which you may find plaintiff has offered evidence that he has suffered. If the plaintiff has failed to prove substantial harm as a result of the publication, then you may award the second type of damages known as nominal damages. Nominal damages are damages for a small sum such as one dollar or ten dollars.

I will touch on a description of punitive damages shortly. However, before moving to the issue of punitive damages with respect to the parties, [15] you must decide whether or not the use of plaintiff's name and photograph were knowingly accomplished in violation of the privacy law previously read to you, by either defendant, Larry Flynt, or defendant, Hustler Magazine, Incorporated.

Knowingly means possession knowledge or information. It means an awareness of a material fact.

Knowingly simply means that a person is aware of the existence of the facts in question and that he has acted in consideration of such facts and produced the specific result.

You must decide whether or not defendant, Larry Flynt, or defendant, Hustler Magazine, Incorporated, through its agents, knew that plaintiff's exhibit A contained the name, portrait and/or picture of the plaintiff and that it was being used in the publication of June 1979 issue of Hustler Magazine without having first obtained Mr. Guccione's written permission. Since you cannot look into the mind of another person, the defendants' knowledge is determined from all of the facts and circumstances and evidence before, during and immediately after the publication of plaintiff's exhibit A.

If you decide that the defendant, Larry [16] Flynt, and/or defendant, Hustler Magazine, Incorporated, knowingly used the plaintiff's name, portrait, and or picture without having first obtained his written consent, you may, in your discretion, award Mr. Guccione what are known in the law as punitive or exemplary damages.

Exemplary or punitive damages may only be assessed on this count against one or both of the defendants whom you have found to have acted knowingly.

Punitive damages on this count, as opposed to the second count of libel, are an amount which the jury may, but is not required to award, to a plaintiff as punishment to the defendant or defendants to discourage them, him or them, and others from committing similar acts to persons such as the plaintiff in this case. Punitive damages are an amount awarded in addition to actual or compensatory damages. If you do not find actual or substantial damages, you cannot award the plaintiff punitive damages. If you award punitive damages the amount should be fair and reasonable under all the facts and circumstances of this case and must bear some reasonable relation to the harm done. It should not be excessive, nor actuated by any feeling of passion [17] or prejudice.

The amount of punitive damages rests in the sound discretion of this jury, and should be determined from all of the evidence in the case, including the evidence concerning the economic status of the defendant, and the circumstances surrounding the alleged invasion of plaintiff's privacy.

If you determine to award punitive damages, you may consider whether or not either one of the defendants, or both of them, acted with personal or express malice for the plaintiff in the publication of plaintiff's exhibit A.

Personal or express malice means anger, hatred, ill will, hostility against one another, or in the spirit of revenge.

In the event that you, in your sole discretion, determine that punitive damages should be awarded Mr. Guccione against either of the defendants, then you may consider the issue of an award for attorneys' fees for counsel employed by plaintiff in the prosecution of his action for invasion of privacy. You may not award attorneys' fees absent a demonstration of personal or express malice, and I must point out and emphasize at this [18] point that you must use the standard of proof, by a preponderance of the evidence, in determining whether or not personal or express malice existed with respect to this claim. Should you make an award of attorneys' fees, you will include such amount as you find fair and reasonable. I would point out that attorneys' fees may not be awarded absent your findings that punitive damages are proper.

In this case it has been stipulated that Mr. Guccione has not suffered any loss of earnings in carrying out his business, and it has been stipulated that he has made no claim and offered no proof of business loss. It has been stipulated that the June 1979 Hustler publication complained of has in no way prevented him from engaging in or pursuing his business.

In considering the issue of damages, if at all, you should consider the sensibilities of the plaintiff under the circumstances of this case. In this connection, you may consider the evidence developed by the defendant with respect to the fact that plaintiff has in some measure discussed and allowed to be widely published what to some people would be considered intimate and private aspects of his life.

[19] The plaintiff has been declared to be a public figure. However, the law under which the plaintiff brings

this action gives him this right to bring this cause of action when his name and photographs are the subject of fictitious report.

Plaintiff Guccione claims that the defendants' publication falsely depicting him as a homosexual engaged in homosexual activity libeled him. Libel is printed or written words or pictures of or about an individual that are of such a nature as to injure a person's reputation or expose him to public contempt, shame, ridicule, or disgrace.

I will now move to the claim of libel. At the outset, I would instruct you that I have previously made and you must accept the findings for all purposes relevant as to this libel action. You must determine the proof of his claim for libel upon the standards which I will give you.

I instruct you that as a public figure, plaintiff has the burden of proving to you that the publication complained of was published with what is known in the law as actual malice, and that he must make such proof by clear and convincing proof which is the standard of proof higher than a preponderance of the evidence.

[20] In order to prove that he has been libeled by the defendants, one or both of them, plaintiff must demonstrate that the defendants published the photographic presentation of the June 1979 issue of Hustler, and marked exhibit A, in violation of the law. Plaintiff must prove not merely negligence or mere falsity of the publication, I instruct you that proof of actual malice requires clear and convincing evidence showing that the defendants published the material complained of with a high degree of awareness of the probable falsity of the publication, and that there be sufficient evidence to permit the conclusion that the defendants entertained serious doubts as to the truth of the publication in order for the standard of proof to be met.

Actual malice is to be distinguished from personal malicious purpose or bad or corrupt motive or from personal spite or desire to injure the plaintiff, although such subjective facts may be relevant in your deliberations on the issue of whether or not actual malice has been shown by clear and convincing evidence.

I would also point out in an action for libel, the defendants, as here, may allege and prove the truth of the matter charged is defamatory. Truth is a complete defense.

[21] You may find actual malice to exist if you find the material complained of to be false and that:

1. The false material was fabricated by the defendants, or

2. The false material was the produce of defendants' imaginations, or

3. The false material was based wholly on unverified accounts from anonymous sources, or

4. The photograph published is so inherently improbable that only a reckless man would have put it in circulation.

[22] In all such actions, mitigating circumstances may be proved with respect to the issue of damages which I will comment on further.

In publications dealing with the activities, lifestyle or published words of a public figure, such as the plaintiff in this case, it is only necessary with regard to the defense of truth that defendants show that they published with substantial accuracy, complete accuracy not being required in order to maintain a defense.

In considering the February, 1979 issue of Hustler in which a report of the complaint in New York filed by Ms. Von Smuda against the plaintiff, and Penthouse and Viva magazines were published, the defendants enjoy a constitutional and statutory right to report with substantial accuracy upon pleadings filed in a court of law. The plaintiff does not contend that the Hustler publication of this lawsuit was materially inaccurate except as to the phrase, "the suit is still pending." You must read the whole of the article and consider the words surrounding this statement.

Calculated falsehood enjoys no immunity under the constitutional guaranties of free speech and press. The guaranties of free speech and press [23] are not the preserve of political expression or comment upon public affairs, but extend to the vast range of published matter when exposes persons to public view, both private citizens and public officials.

Exhibits admitted in this case by the parties may or may not be newsworthy. In this connection, you are instructed that the photograph, exhibit A, is, however, not newsworthy.

This publication is not the basis or plaintiff's claims of libel which you are considering, nor are the other exhibits admitted during the course of trial. These plaintiff's exhibits were admitted, among other things, to support plaintiff's contention that they furnish proof of either actual or expressed malice or ill will or hatred toward him on the part of the defendants.

[24] As I pointed out before, there are three types of damages, which you may award should you find for the plaintiffs on the issue of libel. The first involved nominal damages. Nominal damages are damages in the small sum, such as a dollar or ten dollars.

The second type of damage is referred to as compensatory damages. These are damages which are awarded to compensate plaintiff for the damages which you may find plaintiff has proved that he has suffered from the libel. Such damages must be shown as proximately caused by the libel.

One of the elements of compensatory damages for a libel claim is mental suffering of the plaintiff caused by the publication. Such mental suffering does not include any grief which may be experienced by members of the plaintiff's family caused by the publication, or the influence of such grief on the plaintiff's mind.

A second element of compensatory damage is damage to reputation. If you find Plaintiff's Exhibit A is libel per se under these instructions, then a presumption arises as to damage to reputation.

Should you find that plaintiff has established by clear and convincing evidence that [25] the defendants acted with actual malice, as I have defined that term for you, then you may consider whether you wish, in your sole discretion, to award a third type of damages, which I previously referred to as punitive or exemplary damages.

Punitive damages mean damages by way of punishment, and are not to be measured by the extent of the injury. Punitive damages are given as monetary punishment to make an example, not only for the benefit of the plaintiff, but also for the public good and for the purpose of preventing others from a repetition of like or similar conduct as to another person similarly situated.

Punitive damages, if you, in your discretion award them, are to be assessed in accordance with what would be appropriate financial punishment to the defendants in question in light of their financial ability to pay in light of

gravity under all the circumstances. Thus, for the same wrong, you would not award substantial punitive damages against a defendant of limited means, to the same extent you would against a defendant with greater financial capacity.

If punitive damages are warranted, I charge you they are to be assessed according to the nature [26] and severity of the wrong, and the other considerations I've touched on. They are not to be measured or diminished on account of the plaintiff's affluent financial status.

In the event that you find that a verdict for punitive damages is appropriate, you may, in your sole discretion, make an award to the plaintiff for reasonable attorney's fees in connection with prosecuting this action.

[27] Now, ladies and gentlemen, it is difficult, and almost impossible, to embody all of the law in any single party's instructions. In considering any one portion you must consider it in light of and in harmony with all of the instructions. The court has instructed you on all of the law necessary for your deliberations.

Whether or not certain instructions are applicable, of course, may depend upon the conclusions you reach on the facts. For example, I spent a great deal of time instructing you on how to determine the various kinds of damages, which may be applicable to this case. However, if you fail, for example, to find that plaintiff has proved substantial damages under his claim for libel, then, obviously, my instructions with respect to punitive damages would be inapplicable.

Now, ladies and gentlemen, if somehow you gain the impression, either from the conduct of the court during the course of trial, or indeed in the course of these instructions, or from any emphasis or lack of emphasis in tone

that the court may have used during the course of giving you this charge, you must put this impression aside. This court has chosen no side to favor. It is your job to make [28] determinations with respect to fact. It is my job to deal with matters of law.

Now ladies and gentlemen, I believe it is almost unnecessary, but as a matter of form, I must instruct you that you must not be influenced by any consideration of sympathy, passion or prejudice. It is your duty to weigh the evidence, to decide the disputed questions of fact with deliberation, and to apply these instructions to your findings, and render your verdict accordingly. Your efforts must be to arrive at a just verdict.

Now experience indicates that your initial conduct upon entering the jury room is a matter of considerable importance. It is not wise to immediately express an opinion, to insist upon a certain verdict. I say this because your sense of pride may be aroused, you may feel the necessity to defend your position and may hesitate to give it up, even if you are shown it is wrong.

Your first duty, of course, will be to select a forelady or foreman to guide you in your deliberations. Thereafter, I instruct you that you must go on with your deliberations and must consult with one another during the course of same. Everyone should have the opportunity to express [29] his opinions. You should listen to your colleagues on the jury about their opinions. You must deliberate towards reaching agreement, if you do so without disturbing your own individual judgment. Each of you must decide this case for yourselves, but you should do so only after discussion with your fellow jurors. Don't hesitate to change an opinion if you are convinced it is wrong, but don't surrender honest conviction merely to be congenial.

The court will place in your possession the exhibits and the verdict forms. The foreman, or forelady, will retain possession of these records, including the verdicts, and return them to the courtroom. The foreman or forelady will see that your discussions are orderly and that each juror has the opportunity to discuss the case and to cast his vote; otherwise, the authority of the foreman is the same as any other juror. Any questions regarding law must be in writing.

Your verdict is announced in open court. You are not to disclose to anyone else the status of your deliberations or the nature of your verdict. You will have with you in the jury room a number of verdict forms which I have already explained to you.

[30] When you have reached upon verdicts you will complete the forms which correspond to your decision and sign such verdicts in ink. At least six of you must agree upon each verdict.

You may retire.

TRANSCRIPT OF COUNSEL'S OBJECTIONS TO PORTIONS OF JURY INSTRUCTIONS GIVEN BY COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

[2014] Thereupon, the following proceedings were had out of the Jury's presence and hearing.

THE COURT: Who wants to go first?

All right. Plaintiff first exception to the charge, Mr. Brown. Try to go slowly so I can pick them up.

Oh, for my purposes, would someone give me a copy of the charge?

MR. BROWN: I need mine.

THE COURT: Are there extras?

MR. BROWNFIELD: I will tell you what I will do. I will switch with Herb, if you will. Here is mine, and when he gets through, I will use his.

THE COURT: That is fair.

MR. BROWN: These may not be in order.

THE COURT: Just give them by page and line. Give me a page reference.

Mr. Brown.

MR. BROWN: We object on Page 18 of the charge to the suggestion in Lines 17 through 19 that you should consider the sensibilities of this Plaintiff under the circumstances of the case.

[2015] MR. BROWNFIELD: That was not objected to when we wrote the charge.

MR. BROWN: We have been objecting to that throughout the evidence.

MR. O'NEILL: I don't think we are seeking to reargue it.

THE COURT: This is a general objection that goes back to the admissibility of his statements.

MR. BROWN: And showing what kind of person the Plaintiff is. I think that is carried forward in the charge.

THE COURT: Very well.

MR. BROWN: With respect to the—

THE COURT: In other words, what you are saying is it is too late to modify now, it was an objection made during the course.

MR. BROWN: Yes, and it comes as an instruction and I am protecting the record.

The instruction, and it is not in my copy, but with respect to the failure to call a witness, we believe that that should not be stated conversely with respect to the Plaintiff because we know of no witness that the Plaintiff failed to call on this record.

THE COURT: I can think of one or two, but I don't think I need to burden the record with that. **[2016]** I note it. Thank you.

MR. BROWN: With respect to libel per se, and this is the matter that I spoke on the record to earlier, it is our position that the Court determines without characterizing the photograph, that it is libel per se, and the substantial damages can be given from that without having the Jury make a finding in that regard.

THE COURT: My understanding of that objection is that you feel that I should have directed a verdict that this was libel per se?

MR. BROWN: Or, maybe not directed a whole verdict but just simply tell them it is libel per se.

THE COURT: That is directing a verdict.

MR. BROWN: All right.

THE COURT: I did the best I could, particularly in light of your proffered instruction, and it wasn't numbered, but it has your characterization of the publication.

Go ahead, sir.

MR. BROWN: Now, I am not sure where in the charge, itself. I think maybe I will find it, if you want to be specific, but this is another point of specific acts, newspaper articles, magazines, et cetera, going to the point of mitigation of damages.

It is stated in the charge that they may. [2017] We believe that to be contrary to law.

THE COURT: Where did I say that?

MR. BROWN: Well, I will find it.

THE COURT: Because I would like to state for the record that I scrupulously tried to keep out any hearsay.

MR. BROWN: It is not the hearsay point, it is a matter of those things being considered as mitigation of damages.

Let me go through the other points and while they are giving their points, I will give you the line reference.

THE COURT: Very well.

MR. BROWN: The next is on Page 9.

THE COURT: Back to Page 9.

MR. BROWN: Yes. Of these, yes. I think this is one example.

THE COURT: That is the mitigation.

MR. BROWN: Yes, Line 7, for reducing damages, and it refers back to admission. It starts on Page 8. The bottom of Page 8.

THE COURT: The bottom of Page 8?

MR. BROWN: Right.

THE COURT: During the course of cross, this was a more or less continuing objection you made.

MR. BROWN: This is the fight we have had all [2018] through the trial.

THE COURT: Of allowing the Defendant to be interrogated about his own statements.

MR. BROWN: His statements and—

THE COURT: I understand the objection and I suppose in a way that talks about that, but it is a doubleheader and it applies, also, to Mr. Flynt. So at least I have been either consistently right or consistently wrong. Thank you.

MR. BROWN: Except Mr. Flynt is not claiming any damages.

THE COURT: Well, as to his credibility—

MR. BROWN: Yes, that's on that point.

THE COURT: It certainly went to that.

MR. BROWN: Okay. Page 11, and this I think was just a misspeaking by the Court, you left out a line.

THE COURT: I left out a line; where?

MR. BROWN: Let me see if I can find it.

THE COURT: I will tell you what. If I left something out and it was a typo, I will fix it, I will fix it because I am going to send it back in writing.

MR. BROWN: Here it is, Judge. Let me show you.

THE COURT: What page?

MR. BROWN: It is on the bottom of Page 11. You say in your directed verdict and the publication was [2019] made—no, I guess you are right. I withdraw that objection. You got it right.

THE COURT: Thank you. I tried to read this thing with care.

MR. BROWN: Now, the concept of proximate.

THE COURT: That is right of O.J.I. O.J.I. 1110, proximate cause on damages.

MR. BROWN: We don't object to the definition, but we object to the concept of either invasion of privacy or libel. Our position would be that once you show libel or invasion of privacy, you get the damages without the element of proximate cause, and that's specifically Page 13, Line 12 to 24, Page 14, Lines 4 and 11, and Page 18.

THE COURT: My gracious. I think he would certainly be entitled to nominal damages, but my gracious, I think in order to show some compensatory—for the Jury for compensatory, you've got to show damage.

MR. BROWNFIELD: Hustler versus Handleson.

THE COURT: Okay, I note it.

You are not quarreling with O.J.I. 1110, it is just the concept of proximate cause.

MR. BROWN: In a libel,—

THE COURT: We are not on libel there.

MR. BROWN: It goes to both.

THE COURT: Libel is a different ballgame. [2020] You can presume damages if you have a libel per se, but anyway, let's go on.

I am not suggesting that I am an expert on libel, either. However, I am trying.

MR. BROWN: Page 18, did I give that?

THE COURT: You sure did.

MR. BROWN: Line 20, to the end.

THE COURT: Yes, you did. That is the sensibilities argument.

MR. BROWN: It is the sensibility.

THE COURT: It's a pullover from the trial.

MR. BROWN: Right.

THE COURT: Okay. Anything else?

MR. BROWN: Yes, not too much more, though.

Page 20, and this—we went over this in chambers, and I think it is also on Page 22, Lines 4 to 10, the truth is a defense charge. That is a correct statement of the law, but we believe there is no evidence on this record that gives rise to that defense. There is no suggestion that this photograph is truthful.

THE COURT: Well, that is arguable, I think, and I will submit I will agree with you that it is an awfully close case and you might want to renew that thought

when, in the event that there might happen to be no verdict, I think you would have the right to do that. [2021] I think the standard at this point is such that I could not, in effect direct out the thought of truth, at this point in the trial, certainly.

Go ahead.

MR. BROWN: Now, this, I think, is where an insert on Line 9 of Page 23, we put in here exhibits admitted in this case above.

THE COURT: I added—

MR. BROWN: By the parties, you are instructed that the photograph, Exhibit A, is not newsworthy, which we agree.

THE COURT: All right.

MR. BROWN: Then, when you say, "This publication," it looks like you are referring to Exhibit A. And what we really need there is, "These publications other than Exhibit A, are not bases for Plaintiff's claims for libel because Exhibit A, is the basis for claims of libel," because Exhibit A, is the basis for claims of libel.

THE COURT: I agree with you. I believe on daily copy that this should read, "These other examples of publication are not the basis." Would you agree?

MR. BROWN: These other publications, and I think since the other is right before it, I think it should be other than Exhibit A.

THE COURT: All right. These publications other than.

[2022] MR. BROWN: Right. Are not the basis.

THE COURT: On daily copy, please change on Page 23, "These publications and evidence other than Exhibit A, are not the basis of Plaintiff's claim for libel," et cetera. I agree with you.

MR. BROWN: Thank you.

THE COURT: And I don't know what happened there.

MR. BROWN: Well, I think it was an insert that got put in after we looked at the charge.

THE COURT: All right. Thank you.

MR. BROWN: On Page 4, we reach the question of proximate cause on libel.

THE COURT: Page 4?

MR. BROWN: Twenty-four, Line 12, where it says, "Such damages must be shown as proximately caused by the libel."

Since it is a libel per se, we don't believe we should be required to meet the burden of proximate cause.

THE COURT: You mean, because I didn't direct a verdict.

Off the record.

Thereupon, a discussion was had off the record.

[2023] THE COURT: On the record.

I see your problem, libel per se, damage to reputation is presumed. I have said that, and I think that is the law. However, other types of damages, I think that would be proximate and have to be shown by a proximate cause. That is my understanding of the law.

MR. BROWN: I understand the Court's position and you understand we are taking the same position on both invasion of privacy and libel. I think the Court agrees with us only on libel.

THE COURT: I guess I should have directed a verdict on this. Okay. Well, thank you.

Anything else?

MR. BROWN: Yes. And this is something that I didn't catch until we read it before, so we haven't raised it, but this mental suffering does not include grief, which may be experienced by other members of the Plaintiff's family, I think is a correct statement, but I think the in-

fluence of such grief on the Plaintiff's mind excludes the concept of his concern for future publications.

THE COURT: That is the old touching doctrine, isn't it?

MR. BROWN: And we think that is improper.

THE COURT: Mr. Brown, isn't that the touching doctrine you are talking about? If you and I are riding [2024] down the street or let's say you and your wife are riding down the street, your wife is killed, God forbid, you are not entitled to claims for—isn't that the touching doctrine?

MR. BROWN: I agree that is the law, but I think when you have a libel—

THE COURT: As long as you and I are talking about the same thing.

All right. Note your objection.

MR. BROWN: The last one—that was the last one.

THE COURT: Thank you.

Okay, Mr. Brownfield, I return your copy and I will borrow Mr. Brown's copy.

All right. Let the record show that there have been certain of the proffered instructions that I got from the Defendant, some of which apparently have been withdrawn because there were no specific objections made, or rather by the Plaintiff.

MR. BROWN: I am sorry, I didn't hear that.

THE COURT: You made a couple of proffered instructions, some of which I didn't give. But apparently, you agreed to withdraw them or they were already covered by the Court's hard work.

MR. BROWN: I would like to say I think most of them got dealt with in conference, but I would like to [2025] reserve to study if any of them have been left out, but that specific—

THE COURT: I gave almost all of them. I even went in and found one in the middle of trial that you all overlooked.

MR. BROWN: I think you did give all of them, but what you didn't give we would object.

THE COURT: I don't think you can reserve any more. Do you want to go back and ponder this with Mr. O'Neill? Here's your stuff.

MR. BROWN: Very well.

Okay. Mr. O'Neill tells me to the extent we can reserve, we wish to do so.

MR. O'NEILL: We understand the Court's position and we may not be able to do that.

THE COURT: I think under our agreement, Mr. O'Neill, I think you've got to tell me now.

MR. BROWN: Okay. We will go through them.

THE COURT: You and I spent three hours on this.

MR. O'NEILL: All right, Judge, all right. We will let that alone.

THE COURT: The Plaintiff is satisfied with the exceptions of those noted.

Now, Mr. Brownfield.

MR. BROWNFIELD: Yes, we have already noted our [2026] objections to the directed verdict that appears at Page 12, and I will do that generally with regard to invasion of privacy.

THE COURT: Very well.

MR. BROWNFIELD: On Page 12, having directed the verdict, you also stated, we believe unnecessarily, that publications serve no legitimate newsworthy purpose. You could have directed a verdict based upon the other bases that you earlier found, and I don't think that it was a verdict that you were directing. I think it was a conclusion which you were directing which adversely affects the libel claim as well.

THE COURT: Okay.

MR. BROWNFIELD: On Page 12, also, you indicated that the Jury, Line 11, and thereafter, must decide whether or not the Defendant, Larry Flynt, was involved in the decision to use Plaintiff's name, and we objected to that previously as involved.

We find nowhere in the law that his simply being involved, whatever that may mean in that context, incurs liability for him, and when you add to—that same page—the concept that he, "May have resumed control," the quote is before, "Resumed," resumed control, that implies that if he could have done something as much as becoming Chairman of the Board again without actual [2027] knowledge that he should be personally liable and that conflicts with the actual malice standard and indeed, with the personal knowledge standard which I think is required.

THE COURT: I think Mr. Flynt indicated in one place he said, "I am responsible for everything in the newspaper—in the magazine," and on the other, there has been some indication he wasn't there.

I think that is a matter for the jury. I tried to explain what I thought was involvement. I will have to let her sit. Thank you.

MR. BROWNFIELD: I appreciate you have to let it sit.

THE COURT: Can you think of anything else?

I am sure you don't want any instructions in that area, do you?

MR. BROWNFIELD: In what area?

THE COURT: Do you want a more full explanation of what involvement means?

MR. BROWNFIELD: I think the involvement that should have been expressed was in terms of actual malice, and I think this is inconsistent with it.

THE COURT: I see your point. In other words, you feel that you've got to show actual malice in order to put Mr. Flynt in on this particular count.

MR. BROWNFIELD: No, no. I think that is one [2028] thing, and I think also even as to invasion of privacy, I know that you don't share my view that actual malice is required. Beyond that, I am saying that simple involvement as to invasion of privacy is in the sense that it might be construed by the Jury is not enough to get him liable under Section 51.

THE COURT: Do you suggest a more clear instruction?

MR. BROWNFIELD: When I suggested earlier, I suggested directly involved in the publication.

THE COURT: All right. I like the idea of directly involved. Involved is a bad word.

MR. BROWN: I agree with that.

THE COURT: The daily copy reporter is instructed to, on Line 12, under Page 12, to insert the term, "Directly involved" as opposed to just, "Involved."

MR. BROWN: The only thing I would say for the record is that I don't think it ought to be highlighted out to the Jury; just put it on their copy because we went over this in chambers.

THE COURT: All right. Now, I think we all agree that the charge should go back to the Jury, it is so complicated.

MR. BROWN: I think you are probably right.

MR. BROWNFIELD: More than that, we are making [2029] corrections on the record.

THE COURT: Right.

MR. BROWNFIELD: On Page 13, we also have a not involved which I have already spoken to.

MR. BROWN: I see there is also involved on Page 13.

THE COURT: Where, please?

MR. BROWNFIELD: Top of 13. I am referring to Line 4, which says, "However, it speaks for itself."

THE COURT: All right. Add directly involved.

MR. BROWNFIELD: Yes, or directly caused.

THE COURT: All right. Okay.

MR. BROWNFIELD: Directly involved, I think, but I don't think as to cause. Well, we are not at the point of arguing, we are putting in objections, and I vehemently object.

MR. BROWN: But my concern only is to modifying involved.

THE COURT: I understand.

MR. BROWNFIELD: My concern is the objections I had with regard to "involving" to "caused" and it should be directly caused on Page 13.

THE COURT: Overruled.

MR. BROWNFIELD: Okay. Fourteen, I have no objection.

[2030] You had added a new charge, and I guess it turned out all right. And I didn't—I guess it turned out all right.

Nineteen, Line 3, and I had no objection with the words, but I had objection to the emphasis which the Court—I think with very loud voice—"Gives him this right to bring this action."

THE COURT: You think I used—I put too much emphasis in my voice and subconsciously was trying to get that across to the Jury?

MR. BROWNFIELD: No.

THE COURT: I note your objection.

MR. BROWNFIELD: I just know it came out.

THE COURT: Let's go on. I didn't hear any of those from Mr. O'Neill.

How was it; pretty evenhanded, as far as the charge?

MR. BROWN: I thought there were some both ways, Judge.

MR. O'NEILL: In the Court's charge, I cannot find any inference or inflection occurred in any way that wasn't taken care of in the charge earlier today.

THE COURT: If that didn't correct that error with the almost pounding instructions that they got, we will never have any problem ever, ever again.

[2031] Off the record.

Thereupon, a discussion was had off the record.

MR. BROWNFIELD: Page 21, objection to the entire page, entire charge given there because it is wrong, *St. Amant versus Thompson*, that is wrong.

Page 22 through 24, Pages 22 through 24, I do not object because I can only conclude that the Judge did not charge on libel per se, and has not determined that it is libel per se, is leaving it to the Jury as a libel per quod.

VERDICTS RETURNED BY THE JURY IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Case no. 77CV-04-1692

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE,
Plaintiff

vs

HUSTLER MAGAZINE AND LARRY CLAXTON FLYNT,
Defendants

If you find for Plaintiff against Larry Flynt, personally, on the question of Invasion of Privacy, answer the following questions: Do you find the following?

(1)	Nominal Damages	Yes	No X
(2)	Compensatory damages	Yes	No X
(3)	Punitive Damages	Yes X	No
(4)	Reasonable Attorneys' Fees	Yes	No X

If you find against Larry Flynt and for Plaintiff on the issue of Libel, answer the following questions: Do you find the following?

(1)	Nominal Damages	Yes	No X
(2)	Compensatory Damages	Yes X	No
(3)	Punitive Damages	Yes X	No
(4)	Reasonable Attorneys' Fees	Yes X	No

The Court would point out again that although you may award punitive damages in your discretion as to either or both the defendants, based upon the separate conduct of each of them, you may only award compensatory damages for the total damages allegedly caused, whether or not one or both of the defendants may be held liable therefor.

A Plaintiff may not collect twice for compensatory damages proximately caused by the same act. Therefore, you may award compensatory damages, if any, only for the total damage caused whether or not one or both defendants may have been liable therefor. However, you, in your discretion may award punitive damages separately if you decide to award any such punitive damages.

The Court will repeat, a plaintiff may not collect twice for the damages proximately caused by the same act; therefore, if you have answered yes to any of the above questions, enter the amount of your verdict below.

(1)	Total Compensatory Damages	$ 2,150,000
(2)	Total Nominal Damages	$ 0
(3)	Total Punitive Damages	$26,000,000
(4)	Total Reasonable Attorneys' Fees	$ 150,000

[Signatures of Jurors Omitted in Printing]

Case No. 77CV-04-1692

ROBERT C. GUCCIONE,
Plaintiff

vs

HUSTLER MAGAZINE AND LARRY CLAXTON FLYNT
Defendants

Insofar as the plaintiff's claim against Hustler, Inc. for Invasion of Privacy, on which the Court has directed a verdict, you must answer the following questions: Do you find the following?

(1)	Nominal Damages	Yes	No X
(2)	Compensatory Damages	Yes X	No
(3)	Punitive Damages	Yes X	No
(4)	Reasonable Attorneys' Fees	Yes X	No

If you find against Hustler and for Plaintiff on the issue of Libel, answer the following questions: Do you find the following?

(1)	Nominal Damages	Yes	No X
(2)	Compensatory Damages	Yes	No X
(3)	Punitive Damages	Yes X	No
(4)	Reasonable Attorneys' Fees	Yes	No X

A Plaintiff may not collect twice for compensatory damages proximately caused by the same act. Therefore, you may award compensatory damages, if any, only for the total damage caused whether or not one or both defendants may have been liable therefor. However, you,

in your discretion may award punitive damages separately if you decide to award any such punitive damages.

If your answer was yes to any of the above damage questions please enter the amount of your verdict below:

(1)	Total Compensatory Damages	$ 1,150,000
(2)	Total Nominal Damages	$ 0
(3)	Total Punitive Damages	$11,000,000
(4)	Total Reasonable Attorneys' Fees	$ 150,000

[Signatures of Jurors Omitted in Printing]

Case No. 77CV-04-1692

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

VERDICT FOR PLAINTIFF against LARRY CLAXTON FLYNT ON INVASION OF PRIVACY

ROBERT C. GUCCIONE,
Plaintiff

vs.

HUSTLER MAGAZINE AND LARRY CLAXTON FLYNT
Defendants

We, the Jury, being duly impaneled and sworn, find the issues in this case in favor of the Plaintiff against Larry Claxton Flynt, On Invasion of Privacy

And we do so render our verdict upon the concurrence of 8 members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 1st day of March 1980.

[Signatures of Jurors Omitted in Printing]

Case No. 77CV-04-1692

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

VERDICT FOR PLAINTIFF
Against Hustler, As to Invasion of Privacy

ROBERT C. GUCCIONE,
Plaintiff

vs.

HUSTLER MAGAZINE, *et al.*,
Defendants

We, the Jury, being duly impaneled and sworn, find the issues in this case in favor of the Plaintiff against Hustler, as to Invasion of Privacy

And we do so render our verdict upon the concurrence of 8 members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 1st day of March, 1980.

[Signatures of Jurors Omitted in Printing]

Case No. 77CV-04-1692

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

VERDICT FOR PLAINTIFF
against Hustler Magazine on Libel

ROBERT C. GUCCIONE,
Plaintiff

vs.

HUSTLER MAGAZINE, and
LARRY CLAXTON FLYNT
Defendants

We, the Jury, being duly impaneled and sworn, find the issues in this case in favor of the Plaintiff against Hustler Magazine Libel

And we do so render our verdict upon the concurrence of 8 members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 1st day of March, 1980.

[Signatures of Jurors Omitted in Printing]

Case No. 77CV-04-1692

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

VERDICT FOR PLAINTIFF
against Larry Claxton Flynt on Libel

ROBERT C. GUCCIONE,
Plaintiff

vs.

HUSTLER MAGAZINE AND
LARRY CLAXTON FLYNT
Defendants

We, the Jury, being duly impaneled and sworn, find the issues in this case in favor of the Plaintiff against Larry Claxton Flynt on Libel

And we do so render our verdict upon the concurrence of 8 members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 1st day of March, 1980.

[Signatures of Jurors Omitted in Printing]

TRANSCRIPT OF TESTIMONY OF LEE QUARNSTROM

[1691] Q. (By Mr. Brownfield) Mr. Quarnstrom, were you associated with putting together the May, '79 issue of Bits-and-Pieces, which contains Mr. Hefner's likeness? A. Yes, I was.

Q. Is that a photographic likeness of Mr. Hugh Hefner superimposed over the body of another male? A. Yes, it is.

Q. Where did you get the photograph of Hugh Hefner? A. I couldn't tell you, probably through United Press International, but I can't guarantee that.

Q. Did that come from the photograph department? A. I asked the photo department to get the picture, yes.

Q. Now, the June 1979 issue, which is that issue in this case, I will place before you, and that is Plaintiff's Exhibit A. I direct your attention to Page 19. A. Yes.

Q. And there in the lower righthand corner appears, "Great Moments in Porn, No. 3". A. Yes.

Q. "Bob Guccione discovers vaseline." A. Yes.

Q. Okay. What did you have to do with that publication? A. I was Bits-and-Pieces editor, and it was my **[1692]** conception, my idea of that shot.

Q. Why did you wish to do it? A. Well, because it was a continuation of the series of, "Great Moments in Porn," which we began with Larry Flynt and did with Hugh Hefner and as the third, as the other of the Big Three in men's magazine publishers, Bob Guccione seemed natural as a person to do it with.

Q. Keep your voice up, please. A. Okay.

Q. Why did you, going back to the Hugh Hefner, May, '79 caricature, photographic character, why did you do that one? What was your purpose, what message? A. It wasn't a message, it was just to—it was satire, a scoop, it was to follow up. I liked the one we did with Larry Flynt so much that I decided to come up with a second one.

Q. Did anybody tell you to do it on Hugh Hefner? A. No.

Q. Did you discuss it with anyone who directed you in any way as to how it was done? A. No.

Q. What were you intending to say by showing Hugh Hefner the way you showed him? A. Well, it was sort of a satirical comment on Hugh Hefner's reputation, I guess, as someone who has taken [1693] up sexually with some of his bunnies in his clubs, or models in his magazine.

Q. Did you base that upon what you perceived to be public information about Hugh Hefner? A. Public reputation, I would say reputation, yes.

Q. Did you see specific articles or things that led you to believe that that was true— A. Well—

Q. —or at least that was a public impression? A. Oh, yes.

Q. Now, regarding the June, 1979 issue, what was your purpose in putting that together? A. You mean, in, "Great Moments in Porn, No. 3"?

Q. Yes. The one about Mr. Guccione? A. It was to do a gag about Bob Guccione, the way we had done one about the other two publishers.

Q. What were you intending to say about Mr. Guccione when you put that together? A. Well, it was ac-

tually an attempt to bring together a couple of jokes. I think humor is frequently when two sort of dispirited concepts meet a humorous point. One of the points is that Mr. Guccione is reputed to put vaseline or a similar type of material on the lens of his camera when he shoots photographs of women. Whether or not that is true, I don't know, whether he does it. [1694] I have heard that for many years, long before I got into the men's magazine publishing business. That is the genesis of the concept of vaseline.

The second, there is an old gag about never stoop over to pick up the soap in a shower when you are taking a shower with somebody else. It was to bring that gag into it. And it was also sort of to comment on the fact that Mr. Guccione, as far as I've always heard, is a person who is quite open and candid about his views on sex and sexuality, and it was sort of bringing all of those concepts together in one little photograph.

Q. Did anyone direct you to publish that particular photographic treatment about Bob Guccione? A. Oh, no.

Q. Did Larry Flynt or anyone say to you that he would like to see Mr. Guccione as an object of such a photographic treatment? A. No.

Q. From your superior editors or from anyone else, did you gain such an impression when you put it together? A. No.

MR. GRUTMAN: Objection.

THE COURT: Sustained.

* * * * *

Questions Presented

1. Should this Court reverse a jury verdict which found that all of the facts and evidence presented at trial amply demonstrated that an individual publisher was actuated by malice in causing publication of a false photograph depicting the plaintiff engaged in a homosexual act of anal intercourse?

2. Is it constitutionally permissible to instruct a jury that actual malice may be found where the material in question has been fabricated by the publisher without any basis for believing it to be true?

3. Does due process require a reversal of liability where the jury was provoked by petitioners to award excessive damages in order to deter similar such behavior in the future?

4. Is the decision of a state intermediate appellate court "final" where it remands the case for a new trial on the issue of damages, which may involve federal constitutional questions?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
A. The jury determined that Flynt acted with actual malice	5
B. The jury was properly instructed on the actual malice standard	9
C. Petitioners were not entitled to a jury instruction that the offensive and false photograph was protected as parody or satire	12
D. A jury award of excessive damages does not necessarily taint its finding of liability	15
E. The petition is jurisdictionally defective because of the absence of a final judgment	18
CONCLUSION	21

PAGE

Table of Authorities

Cases Cited

Arnold v. United States, 263 U.S. 427 (1923) 19

Bindrim v. Mitchell, 92 Cal. App. 61 (1978), cert. denied, 444 U.S. 984 (1979) 15

Collins v. Miller, 252 U.S. 364 (1919) 19

Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58 (1920) 15

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 20

Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir.), aff'd, 388 U.S. 130 (1965) 16

Curtis & Gartside Co. v. Pigg, 39 Okla. 31 (1913) .. 17

Dean v. Mitchum-Thayer, Inc., 450 F. Supp. 1 (E.D. Tenn. 1978) 17

Dorin v. Equitable Life Assurance Society, 382 F.2d 73 (7th Cir. 1967) 17

Edwards v. Sears, Roebuck and Co., 512 F.2d 276 (5th Cir. 1975) 17

F.E. Smith v. Great Northern Railway Co., 133 Minn. 192 (1916) 17

Flynt v. Ohio, —— U.S. ——, 68 L.Ed2d 489 (1981) 20

Gertz v. Welch, 418 U.S. 323 (1974) 13

Gorsalitz v. Olin Matheson Chemical Corp., 429 F.2d 1033, modified, 456 F.2d 180 (5th Cir. 1970), cert. denied, 407 U.S. 921 (1972) 17

Goudy v. Dayton Newspapers, Inc., 14 Ohio App. 2d 207 (1967) 14

PAGE

Herbert v. Lando, 441 U.S. 153 (1979) 7

LaCombe v. Minneapolis Street Railway Co., 236 Minn. 86 (1952) 17

Lee v. Zaske, 213 Minn. 244 (1942) 17

Louisville & Nashville Railroad Co. v. Mattingly, 318 S.W.2d 844 (Ky. 1958) 17

Mangigian v. Toolin, 77 R.I. 151 (1950) 17

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Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969) 15

New Orleans & N.E.R. Co. v. Snelgrave, 148 Miss. 890 (1927) 17

Pearson v. Ford Motor Co., 32 Ill. App. 3d 188 (1975) 17

Pingatore v. Montgomery Ward and Co., 419 F.2d 1138 (6th Cir. 1969), cert. denied, 398 U.S. 928 (1970) 17

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 20

Republic National Gas Co. v. Oklahoma, 334 U.S. 62 (1947) 19

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 13

St. Amant v. Thompson, 390 U.S. 727 (1968) 11

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 4

PAGE

Statute Cited

28 U.S.C. §1257 18

Other Authority Cited

Prosser, Law of Torts (4th ed. 1971) 13-14

NO. 81-2102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HUSTLER MAGAZINE, INC. and LARRY C. FLYNT,
Petitioners,

vs.

ROBERT C. GUCCIONE,
Respondent.

On Petition for Writ a Writ of Certiorari to the Supreme Court of Ohio

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Robert C. Guccione, respectfully requests that this Court deny the petition for a writ of certiorari to review the decision of the Ohio Supreme Court dated January 27, 1982 dismissing petitioners' appeal and to review the decision of the Court of Appeals of Franklin County, Ohio, dated October 8, 1981.

Statement of the Case

The petition in this case raises no issue worthy of review by this Court. The first three questions presented incorrectly assume that the defendant was found liable without fault. Instead of raising federal constitutional issues, these questions merely address factual issues relating to the evidence of malice presented at trial. The last question presented offers the novel and erroneous theory that due process is somehow violated where a damage award is reversed as excessive but liability is upheld. Petitioners' appeal to the Supreme Court of Ohio was dismissed sua sponte "for the reason that no substantial constitutional question exists herein" (A. 1).

In the June 1979 issue of Hustler Magazine, published by the petitioners Hustler Magazine, Inc. and Larry Flynt, two male models were paid to pose nude engaging in the act of anal intercourse. The head of respondent Robert C. Guccione was cropped from an innocuous photograph of Mr. Guccione dining on his patio and superimposed on the man performing penetration in the homosexual, sodomous act (A. 72). The photograph was captioned "Bob Guccione Discovers Vaseline". Neither Flynt nor anyone else at Hustler Magazine actually believed Guccione to be a homosexual. No evidence was presented to support the truth of the manner in which Guccione was depicted in petitioners' false photograph.

The publication of this libelous photograph was the culmination of a campaign of malicious attacks upon Guccione, waged relentlessly by Flynt in the pages of Hustler Magazine. Twenty-five percent of petitioners' publications contained some disparaging reference concerning Guccione.

The evidence at trial established that Flynt was repeatedly cautioned to cease his campaign of malicious attacks upon Guccione: Guccione personally requested Flynt to halt such slurs; Guccione's attorney demanded in writing that Flynt cease his attack; one of Flynt's employees even suggested that disparaging references to Guccione be discontinued because of the potential danger of a lawsuit. Flyn't response was to escalate the pattern and content of his attack.

For example, the July 1975 Hustler Magazine included a feature naming Guccione "Asshole of the Month", accompanied by a vile and repulsive illustration with a likeness of Guccione. In May 1976, petitioners published a full-page cartoon in Hustler Magazine illustrating both Guccione and his girl friend Kathy Keeton. In the caption of the cartoon, Guccione was identified as "a popebaiting, angel faced greaseball", who had given the woman he had lived with for fourteen years a "dose" of "runny clap". Though Flynt denied knowledge of this cartoon at trial, the cartoonist who drew it testified that the cartoon had been personally commissioned by Flynt, who specified its content and supplied the cartoonist with photographs of Guccione and Keeton so that their likenesses could be accurately illustrated.

Respondent reacted to the publication of this cartoon by filing an $80 million lawsuit against Flynt and his magazine. Undeterred, Flynt continued his attack which finally resulted in the fabricated photograph depicting respondent commiting an act of anal intercourse. Thus, at the very same time that Flynt was being accused of malicious libel by Guccione in a lawsuit for millions of dollars, Flynt recklessly published a false photograph designed to further denigrate Guccione's reputation.

When Flynt was warned that his actions would result in a lawsuit, his response was that he hoped so because "it would give him the press he wanted." Flynt explained: "It would be four, five years to get into court and by then we would have more money than that in publicity."

In the June 1976 issue of Hustler Magazine, petitioners boldly announced their defiance to authority. In an editorial discussing the impact upon publishers of this Court's decision in *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976), petitioners wrote:

> "[T]hey are afraid to report *anything* other than the most bland inoffensive bullshit about *anybody* for fear of being slapped with lawsuits that might end up in the same Supreme Court that handed down this ridiculous decision . . .
>
> How will this latest restriction of our individual rights affect HUSTLER and its no-bullshit reporting policy? It won't. We'll continue to report matters as we see them in the same forthright, down-to-earth manner. Whether a person is a private citizen or a public figure, if he's an asshole, a shithead or a scumbag that's just the way you'll seem him in HUSTLER.
>
> • • •
>
> If this means the presses that print HUSTLER must be halted because of our editorial stance, then let them be halted. There will be no compromise."

Petitioners sound the same note in response to an adverse obscenity decision issued by a Cincinnati court. The presiding judge in the case was named "Asshole of the Month", and other participants were characterized as

"Farts in the Wind". Flynt, speaking through his magazine, stated:

> "After getting the shit kicked out of us in a courtroom, you'd think we'd be reluctant to take on the people who held us down and kicked us. But HUSTLER magazine doesn't back down and will never tuck its tail between its legs and run for cover."

This case went to the jury on a most heinous libel*, for which there wasn't a shred of truthful basis and which culminated a campaign of ever-increasing malicious attacks upon the respondent, his business and his associates. The record of malice on the part of petitioners is unparalleled. The jury had Flynt's defiance before them. They heard his pronouncement to the effect—I will not stop, you cannot make me, I will say whatever I please about anyone, the courts and the law be damned.

Reasons for Denying the Writ

A. The jury determined that Flynt acted with actual malice.

Respondent agrees that a public figure plaintiff can only recover damages by establishing that the defamatory falsehood was published with actual malice. The gravamen of petitioners' argument is that actual malice was not demonstrated as to Flynt. This contention, however, fails in two respect to raise an issue that should be considered by this Court: (1) it overlooks the trial

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* In ruling on petitioners post-trial motions, the trial court was constrained to observe that: "The libel involved in this action was of the grossest sort, most reprehensible in nature" (A. 51).

court's proper instructions to the jury on the actual malice standard and (2) it merely raises a factual dispute as to whether the evidence supported a finding of actual malice as to Flynt.

Petitioners entire position rests upon an incomplete quote of dicta from the Ohio appellate court decision. At page 25 of its petition, petitioners cite the appellate decision but omit the very next paragraph of text, which notes:

> "Since defendant Flynt admits he was publisher and chairman of the board of Hustler at the time in question, he is responsible for the libel of plaintiff in the June 1979 issue of Hustler, whether or not defendant Flynt had knowledge thereof prior to publication. *In addition, there is ample circumstantial evidence that the publication in the June 1979 issue of Hustler was a continuation of a policy previously established by defendant Flynt when he was president, as well as publisher and chairman of the board of Hustler*" (A. 24) (Emphasis added).*

In the first place, an appellate court's dicta as to Flynt's involvement cannot raise a constitutional question for this Court's review where the jury was properly instructed and the factual question of malice resolved against Flynt. Neither the parties nor the trial court ever suggested that Flynt's liability rested upon any notion of strict liability. No such instruction was given to the jury. Instead, the

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* At pages 23-24 of their petition, petitioners also provide a lengthy, but irrelevant, quote from the appellate court decision. That quote relates solely to the invason of privacy claim which was dismissed and is therefore not before the Court on this petition.

trial court properly charged the jury that plaintiff has the burden of proving actual malice by clear and convincing evidence, and that plaintiff must prove that Flynt had a high degree of awareness of the probable falsity of the material and entertained serious doubts as to the truth of the publication (A. 90). Petitioners' disappointment with the jury's determination of the *factual question* of malice hardly requires the intervention of this Court.

In the second place, the appellate court recognized that "ample circumstantial evidence" was presented to the jury to warrant a finding of malice against Flynt. This circumstantial evidence—"objective evidence from which the ultimate fact could be inferred "—has long been accepted as a way of proving actual malice. *Herbert* v. *Lando*, 441 U.S. 153, 165 n.15, 170 (1979). The record is replete with facts demonstrating Flynt's reckless disregard for the truth. In addition to the campaign of defamation launched by Flynt against Guccione from the inception of the publication of Hustler Magazine, Flynt's personal involvement with the June 1979 issue was supported by the following facts:

(1) Petitioners argue that Flynt was disabled and hospitalized prior to the publication of the June 1979 issue of Hustler Magazine, yet the magazine's 1978 financial statement noted: "The Chairman of the Board [Flynt] has resumed his full normal duties" (Ex. RRR);

(2) The October 1978 issue of Hustler Magazine boldly proclaimed on its cover "Larry's Back" (Ex. U);

(3) Flynt's certified public accountant testified that: "We were made aware that Larry Flynt comes

to the office and that he is undergoing physical therapy. And we have seen him in the office almost daily. And therefore, it doesn't seem appropriate to qualify either the 1977 or the 1978 financial statement with a caution that it did not appear to be a going concern" (Dubey Deposition, pp. 79-80);

(4) Flynt announced publicly in May 1979 and again in June 1979 that he assumed full responsibility for the material contained in Hustler Magazine (R. 441, 443);

(5) Even while Flynt was hospitalized, a copy of the magazine galleys was taken to him for his approval (R. 1781) and the Hustler staff was instructed that nothing went into the magazine without Flynt's personal approval (R. 1783);

(6) Flynt testified that the defamatory material in question depicted Guccione, and was so intended (R. 352);

(7) In February 1980 Flynt testified at the trial that only "in the last five issues I haven't seen anything that is down in it. I used to approve things that went in the magazine, but I don't any more." (R. 358).

Moreover, Flynt failed to offer even a scintilla of proof to show that there was any basis for his believing that Guccione was a homosexual. Most significantly, Flynt published this vicious libel at a time when he was already being personally sued by Guccione for defamation in the amount of $80 million! The jury reached its verdict after carefully considering all of the direct and circumstantial evidence of Flynt's reckless con-

duct. As the trial court held: "Obviously, the jury rejected out of hand Mr. Flynt's protestations of non-involvement, accepting plaintiff's evidence on that issue" (A. 51). Petitioners here merely seek to relitigate a factual determination made by the jury upon proper instructions.

B. The jury was properly instructed on the actual malice standard.

In his second question presented, petitioner Flynt complains that the trial court improperly instructed the jury that liability could be imposed upon a finding that the false photograph was "fabricated" or "the product of defendants' imaginations," and that the jury was not given a proper instruction on the actual malice standard.

By this argument, petitioners focus upon only one segment of the charge (A. 91) and blind themselves to the full explanation of actual malice given by the trial court:

> "I instruct you that as a public figure, plaintiff has the burden of proving to you that the publication complained of was published with what is known in the law as actual malice, and that he must make such proof by clear and convincing proof which is the standard of proof higher than a preponderance of the evidence.
>
> In order to prove that he has been libeled by the defendants, one or both of them, plaintiff must demonstrate that the defendants published the photographic presentation of the June 1979 issue of Hustler, and marked Exhibit A, in violation of the law. Plaintiff must prove not merely negligence or mere falsity of the publication. I instruct you

> that proof of actual malice requires clear and convincing evidence showing that the defendants published the material complained of with a high degree of awareness of the probable falsity of the publication, and that there be sufficient evidence to permit the conclusion that the defendants entertained serious doubts as to the truth of the publication in order for the standard of proof to be met.
>
> Actual malice is to be distinguished from personal malicious purpose or bad or corrupt motive or from personal spite or desire to injure the plaintiff, although such subjective facts may be relevant in your deliberations on the issue of whether or not actual malice has been shown by clear and convincing evidence." (A. 90-91)

Petitioners do not challenge the correctness of this instruction, but simply ignore it, preferring instead to pretend that the subsequent portion of the jury charge was given in isolation:

> "You may find actual malice to exist if you find the material complained of to be false and that:
>
> 1. The false material was fabricated by the defendants, or
>
> 2. The false material was the product of defendants' imaginations, or
>
> 3. The false material was based wholly on unverified accounts from anonymous sources, or
>
> 4. The photograph published is so inherently improbable that only a reckless man would have put it in circulation." (A. 91).

When read together with the prior charge on actual malice, this instruction cannot be seriously challenged. Indeed, it is lifted directly from this Court's decision in *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968):

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation."

It surely was not error for the trial court to give instructions based upon the teaching of this Court in *St. Amant* v. *Thompson*.

Petitioners erroneously claim at page 32 of their petition, without reference to the record or their appendix, that "[o]bjections were interposed by defense counsel to this aspect of the charge". The Ohio appellate court has already resolved this point by holding that "defendants did not interpose an express objection to the charge and, therefore, are precluded from raising the issue on appeal by Civ. R. 51(A)" (A. 28).

C. Petitioners were not entitled to a jury instruction that the offensive and false photograph was protected as parody or satire.

Petitioners claim that the trial court's instructions failed to account for the nature of the false photograph as "a fair satirization of Guccione's open sexual conduct . . ." (petition, p. 39). But the photograph was plainly neither "fair" nor a "satirization". As indicated above, petitioners never attempted to prove any basis for believing that Guccione was a homosexual or performed homosexual acts. The Ohio appellate court repeatedly addressed this point:

> "There was no effort to show the truth of the matters asserted in the publications involved . . ." (A. 17)
>
> ". . . the claim is predicated solely upon one publication, that of the June 1979 issue of Hustler depicting plaintiff engaging in an act of buggery with another man. Defendants at no time made any effort to even suggest that plaintiff in fact ever engaged in any such act." (A. 28)
>
> "There has been no contention made by defendants that plaintiff at any time engaged in conduct of the type depicted in the June 1979 issue of Hustler". (A. 28)

Petitioners urge this Court that the jury instructions were erroneous, yet they fail to point to any place in the record where a proper objection was raised or where their proposed version was submitted for the trial court's consideration. Petitioners' belated complaint on this issue has long been waived.

The inconsistent contention advanced in the petition is that the jury could improperly find liability without a

finding of actual malice. But this argument is directly contrary to the instructions given which, as explained earlier, completely and correctly set forth the actual malice requirement.*

In effect, petitioners are trying to create some constitutional immunity from libel out of the very reckless nature of their conduct. Thus, petitioners urge that because they fabricated the offensive photograph about Guccione, they are protected under the rubric of satire. But such a radical theory has never been adopted by the courts, is certainly not part of the First Amendment's guarantee of free speech and press and is not supported by even a single case.

In his leading treatise on torts, Dean Prosser states:

> "One common form of defamation is ridicule. It has been held to be defamatory to publish humorous articles, verses, cartoons, or caricatures making fun of the plaintiff, to heap ironical praise upon his head, to print his picture in juxtaposition with an article on evolution and a photograph of a gorilla, or with an optical illusion of an obscene or ludicrious deformity readily detected at a second glance. It is, of course, possible that humor may be understood by all who hear or read it as good natured fun, not to be taken seriously or in any defamatory sense; but when it causes adverse rather than sympathetic or neutral merriment, it becomes defama-

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* Petitioners argue that "treatment of a matter of legitimate public interest" invokes the actual malice test (petition, p. 40). That proposition, however, was rejected in *Gertz* v. *Welch*, 418 U.S. 323 (1974), when this Court declined to follow the holding of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). But the actual malice standard is applicable in any event because Guccione was found to be a public figure.

> tory." Prosser, *Law of Torts,* pp. 742-43 (4th ed. 1971).

Apparently, no one other than petitioners appreciated the "satire" involved in the offensive photograph. As the Ohio appellate court remarked:

> "While defendants contend that the picture was intended as satire, the innocent satire is so subtle that it escaped plaintiff, escaped the trial court, escaped the jury and escapes this court. To the average person viewing the picture in question, it is quite clear that it is intended to portray plaintiff Guccione engaging in an act of buggery, with no implication other than that he engages in such an act, despite the caption which might have a double meaning to those engaged in certain types of photography" (A. 28-29).

The Ohio courts have specifically rejected the defense of humor to a libel action. In *Goudy* v. *Dayton Newspapers, Inc.,* 14 Ohio App. 2d 207, 211 (1967), the court followed the New York rule:

> "The New York rule with respect to humorous words in libel actions is stated in *Triggs* v. *Sun Printing & Publishing Association,* 179 N.Y. 144, 155, 71 N.E. 739, 103 Am. St. Rep. 841, 66 L.R.A. 612, quoted in *Lamberti,* supra, as follows:
>
> "'• • • if, however, they can be regarded as having been published as a jest, then it should be said that however desirable it may be that the readers of and the writers for the public prints shall be amused, it is manifest that neither such readers nor writers shall be furnished such amusement at the expense of the reputation or business of another • • •'

> The opinion further states that jest is not justification 'unless it is perfectly manifest from the language employed, that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related'."

Even a work identified as pure fiction does not guarantee immunity from defamation. See *Bindrim* v. *Mitchell*, 92 Cal. App. 61 (1978), *cert. denied*, 444 U.S. 984 (1979). As the Fourth Circuit held in *Middlebrooks* v. *Curtis Publishing Co.*, 413 F.2d 141, 143 (4th Cir. 1969), "the fictional setting does not insure immunity" and "[r]eputations may not be traduced with impunity, whether under the literary form of a work of fiction or in jest", quoting from *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58 (1920).

The photograph itself together with petitioners' admission remove any doubt that the material sued upon was of and concerning Robert C. Guccione. The jury was properly instructed on the actual malice standard, so that the issue of parody or satire raises no constitutional question which requires review by this Court.

D. A jury award of excessive damages does not necessarily taint its finding of liability.

Petitioners' last question presented likewise fails to raise a constitutional issue for this Court's review. The allegations of "prejudicial misconduct" on the part of counsel are factual matters that have already been resolved by the Ohio courts.

Without any apparent purpose, petitioners dwell upon evidence and testimony presented at trial that exacerbated Guccione's claim for both compensatory and puni-

tive damages. But the damage awards were reversed by the Ohio appellate court, and the trial excerpts relied upon by petitioners have absolutely nothing to do with the question of liability.

For example, petitioners incredibly contend that a portion of counsel's closing argument asking the jury to punish Flynt and deter him from similar conduct (petition, pp. 46-48) and Guccione's testimony about other persons, such as his family and friends, who also suffered as a result of petitioners' libel (petition, pp. 51-52), is "the same evidence" necessary for the jury to find liability (petition, p. 54) and that the finding of liability is therefore "tainted and poisoned" with the passion and prejudice that caused an excessive damage award. This argument fails for several reasons: (1) the issue of liability in this case was clearly distinct from the issue of damages, i.e., what injuries were suffered by Guccione and to what extent Hustler and Flynt should be punished to deter them from future wrongdoing and (2) there was overwhelming evidence to uphold the finding of liability.

In a leading libel case, *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702 (5th Cir.), *aff'd*, 388 U.S. 130 (1965), the Fifth Circuit held that a remititur, rather than a new trial, was proper because the determination of liability was unaffected by the passion and prejudice which resulted in excessive damages. The court quoted with approval the appraisal of the district court: "The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." 351 F.2d at 707. Accordingly, "a jury's finding as to liability can be binding even though its monetary award is found to be excessive or even improperly influenced—our deference to

and faith in the jury system demands at least this much". *Edwards* v. *Sears, Roebuck and Co.*, 512 F.2d 276, 282 (5th Cir. 1975). Even where the court has concluded that a grossly improper and intemperate argument inflamed the jury, a new trial can be ordered on the issue of damages only, and a constitutional issue is not thereby raised requiring review by this Court. *Pingatore* v. *Montgomery Ward and Co.*, 419 F.2d 1138, 1142-44 (6th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970). Accord, *Gorsalitz* v. *Olin Matheson Chemical Corp.*, 429 F.2d 1033, *modified*, 456 F.2d 180 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1972); *Dorin* v. *Equitable Life Assurance Society*, 382 F.2d 73, 78 (7th Cir. 1967); *Dean* v. *Mitchum-Thayer, Inc.*, 450 F. Supp. 1, 3 (E.D. Tenn. 1978).

In addition, there are numerous reported state cases which have remanded for a new trial the issue of damages only, despite a finding of excessive damages due to passion and prejudice. See, *e.g.*, *Pearson* v. *Ford Motor Co.*, 32 Ill. App. 3d 188 (1975); *Louisville & Nashville Railroad Co.* v. *Mattingly*, 318 S.W.2d 844, 849-50 (Ky. 1958); *LaCombe* v. *Minneapolis Street Railway Co.*, 236 Minn. 86, 93-94 (1952); *Mangigian* v. *Toolin*, 77 R.I. 151 (1950); *Lee* v. *Zaske*, 213 Minn. 244, 249-50 (1942); *New Orleans & N.E.R. Co.* v. *Snelgrove*, 148 Miss. 890, 900-01 (1927); *F.E. Smith* v. *Great Northern Railway Co.*, 133 Minn. 192, 195-96 (1916); *Curtis & Gartside Co.* v. *Pigg*, 39 Okla. 31, 47 (1913).

Here, the overwhelming evidence of liability leaves no room for doubt that the defamatory photograph was published with actual malice. As the Ohio appellate court aptly observed:

> ". . . the claim is predicated solely upon one publication, that of the June 1979 issue of Hustler de-

> picting plaintiff engaging in an act of buggery with another man. Defendants at no time made any effort to even suggest that plaintiff in fact ever engaged in any such act. Rather, as noted above, defendants' defense was that this was satire, even though the actual act depicted was untrue. Construing the evidence most strongly in favor of defendants, reasonable minds could only conclude that defendants published this picture in the June 1979 issue of Hustler with reckless disregard for its truth or falsity, if not with actual knowledge of its falsity" (A. 28).

Later, the court notes that: "A careful review of the record impresses the reader with a definite pattern of unprovoked malice demonstrated by Defendants toward Plaintiff" (A. 53).

The factual question of malice is not connected or dependent upon the amount of compensatory and punitive damages to be awarded, so that any passion or prejudice which contaminated the damage issue did not affect the question of liability. The abundance of proof establishing actual malice on the part of both Hustler and Flynt is a factual matter that has already been carefully weighed by a jury and several Ohio courts—it surely does not invite review by this Court.

E. The petition is jurisdictionally defective because of the absence of a final judgment.

Review by this Court is expressly limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." 28 U.S.C. §1257. Thus, the very first jurisdictional predicate which must exist is the requirement of "finality." The journal

entry of judgment by the Ohio Court of Appeals recites that "this cause is remanded to [the Franklin County Court of Common Pleas] for a new trial upon the issue of damages" (A. 44).

The determination of the Ohio appellate court remanding the case for a new trial on the issue of damages is surely not "the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California,* 324 U.S. 548, 551 (1944). Because the judgment "should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved," the new trial ordered by the Ohio appellate court precludes review at this juncture. *Collins* v. *Miller,* 252 U.S. 364, 370 (1919); *Arnold* v. *United States,* 263 U.S. 427, 434 (1923).

The determination of damages in a new trial is not a mere ministerial act, but a plenary proceeding which may involve First Amendment considerations regarding the kind of damages a defamation plaintiff is entitled to recover. This Court ruled in *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68 (1947), as follows:

> "Thus *the requirements of finality has not been met* merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example *where liability has been determined and all that needs to be adjudicated is the amount of damages.* Bruce v. Tobin, 245 US 18, 62 L ed 123, 38 S Ct 7; Martinez v. International Bkg. Corp. 220 US 214, 223, 55 L ed 438, 43, 31 S Ct 408; Mississippi C.R. Co. v. Smith, 295 US 718, 79 L ed 1673, 55 S Ct 830." (Emphasis added).

This is not the first time Flynt has sought premature review by this Court of a nonfinal judgment. In *Flynt* v. *Ohio,* —— U.S. ——, 69 L.Ed 2d 489 (1981), this Court dismissed Flynt's petition for certiorari for want of jurisdiction. The Court observed the general rule which precludes review "where anything further remains to be determined by a State court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the State", *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124 (1945), and proceeded to analyze the four categories of exceptions enumerated in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975). None of these exceptions are applicable here, particularly since the trial on damages could give rise to other federal issues which petitioners may raise at a later date. As in *Flynt* v. *Ohio,* the new trial in this case may yet involve federal issues, so that it cannot be said on this petition that there is "no probability of piecemeal review with respect to federal issues." 68 L.Ed. at 488.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: June 9, 1982

Respectfully submitted,

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No. 81-2102

In the Supreme Court of the United States

October Term, 1981

HUSTLER MAGAZINE, INC., AND LARRY C. FLYNT,
Petitioners,

vs.

ROBERT C. GUCCIONE,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES .....

PETITIONERS' RESPONSIVE STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

A. The Ohio Appellate Court's Holding That Flynt Had No Actual Advance Knowledge of, or Involvement in, the Cartoon Precludes a Finding of Actual Malice 4

B. The Jury Instruction was Based Upon a Misreading and Misapplication of St. Amant ... 8

C. A Jury Instruction that a Parody or Satire can be Libelous Merely Because It Is "False and Fabricated", or "The Product of the Defendant's Imagination" is Unconstitutional 9

D. A Jury Finding of Liability Violates Due Process When it Results From Passion and Prejudice. ... 12

E. There is a Final Judgment Below for the Purpose of Granting Certiorari 16

TABLE OF AUTHORITIES

Cases

Arno v. Stewart, 245 C.A.2d 955, 54 Cal. Rptr. 392 (App. 1st Dept. 1966) 11

Blake v. Hearst Publications, 75 C.A.2d 6 170 P.2d 100 (App. 2d Dist. 1946) .. 11

Brady v. Maryland, 373 U.S. 83 (1963) .. 19

Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975) 16,17,18

Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965) 14

Dorin v. Equitable Life Assurance Society, 382 F.2d 73 (7th Cir. 1967) 15

Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) 14

Lamberti v. Sun Printing & Pub. Assn., 111 App. Div. 437, 97 N.Y.S. 694 (2d Dept. 1906) 11

Letter Carriers v. Austin, 418 U.S. 264 (1974) 12

Meyers v. Boston Magazine, 403 N.E. 2d 376 (Mass. 1979) 11

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 19

New York v. Cathedral Academy, 434 U.S. 125 (1977) 19

St. Amant v. Thompson, 390 U.S. 727 (1968) 8,9

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 4

Univ. of Notre Dame v. Twentieth Century Fox, 22 A.D.2d 452, 256 N.Y.S.2d 301 (1st Dept.) 11

Books, Articles

Guccione, The First Time, ... 3

Silver, "Libel, The Higher Truths of Art and the First Amendment," 126 U. Pa. L. Rev. 1065 (1978) 10

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HUSTLER MAGAZINE, INC.,
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ROBERT C. GUCCIONE, Respondent.

Petitioners' Reply Brief

On Petition For A Writ Of Certiorari
To the Supreme Court of Ohio

PETITIONERS' RESPONSIVE STATEMENT OF THE CASE

As tried by the jury, this case is based solely (A8-9) upon the publication in the June, 1979 issue of Hustler of a photocartoon (A72) of Respondent Robert Guccione (hereinafter "Guccione"), an all purpose public figure ("Cartoon").

Guccione does not deny any of the facts set forth on pp. 7-19 of Petitioners' Main Brief. Instead, Guccione asserts on pp. 3-4 of his Brief that the Cartoon was published

in June 1979 in defiance of a lawyer's letter "warning" that it would result in a lawsuit. First, that "warning" letter is completely irrelevant to the Cartoon since that letter (i) was sent two and one-half years before (i.e., January 13, 1977), and (ii) referred to an different matter (i.e., an intended advertisement by Hustler comparing circulation and other advertising figures of Hustler with Guccione's Penthouse). Secondly, the publication of the Cartoon could not have been intended by Petitioner Flynt (hereinafter "Flynt") to defy any prior lawsuit or warning by Guccione because the Ohio Appellate Court held that Flynt had no personal involvement in, or connection with, the issue of Hustler which contained the Cartoon!

Guccione's Brief at p. 3 complains about a cartoon in Hustler in May 1976 referring to Guccione, which was the subject of Counts one and two of Guccione's Complaint. However, the trial in this case was based only

on the Cartoon in the June 1979 issue of Hustler (A8). Second, the May 1976 cartoon showed an open case of "Vaseline" in a Mr. "Goccione's" office and stated in part that Guccione didn't "... need 'Vaseline' to make [his] camera fuzzy and romantic ..." This May 1976 cartoon, like the Cartoon, parodied Guccione's use of Vaseline on his camera lenses to create his "soft-focus" photographs of nude models. Third, the May 1976 cartoon was satirizing (i) Guccione's venereal diseases, and (ii) his sexual encounters described in his 1975 book The First Time (pp. 313-314 of trial transcript). Guccione publicly revealed in his book very intimate details about his many different sexual encounters and venereal diseases, stating on page 78:

> "... I went through a period of terrible promiscuity ... I was getting laid four or five times a day. I was living with a Pan-American ground hostess and screwing her two and three times a day, and as soon as she left for work in the morning I was out on the move looking for something else. ... Whores turned me on, and they still do to some extent,

and I must have screwed more than a hundred of them ... I went through a period when I was impotent for three or four years. I picked up a couple of minor venereal diseases." (Emphasis added.)

Guccione at pp. 4-5 of his Brief, refers to Flynt's comment on Time, Inc. v. Firestone, 424 U.S. 448 (1976). Even if Flynt's philosophy on the First Amendment were relevant, Guccione has misstated it:

"Mr. Grutman: Well, I'm asking if you disagree with the Supreme Court about what it said a publisher could or could not do. Did you believe that you were required to follow what the Supreme Court said?
Answer: We'd always tried to follow the law.
Question: Where you disagree with the law, what do you do then?
Answer: We still try to follow the law." (p. 406 of Trial Transcript)

REASONS FOR GRANTING THE WRIT

A. The Ohio Appellate Court's Holding That Flynt Had No Actual Advance Knowledge of, or Involvement in, the Cartoon Precludes a Finding of Actual Malice

Guccione incorrectly argues at p. 6 of his brief that the Appellate Court finding that Flynt had no connection with, or personal involvement in, the Cartoon is "dicta" and "relates solely to the invasion of

privacy claim ..." However, the Ohio Appellate Court held without any such limitation that Flynt had no personal

> "... involvement in the June 1979 publication either by use of (Respondent's) name or the obtaining of (his) photograph and the use thereof..." (A23)

The Ohio Appellate Court then applied this holding to both the invasion of privacy and libel claims. Specifically, the Ohio Appellate Court then applied, to the libel claim, that factual finding and held:

> "On the other hand, defendant Flynt's position as the publisher and chairman of the board of Hustler makes him individually liable for a libel printed in Hustler, even if he had no actual knowledge of the libel prior to its publication." (Emphasis added). (A22-23)

In support, the Court then cited the Ohio rule, that in determining whether a publisher is liable for a libel in his newspaper "... it is immaterial whether or not he knew the contents of the publication ..." (A24). After citing that rule, the Ohio Appellate Court repeated its prior holding that as Hustler's Publisher and Chairman,

Flynt was strictly liable for publication of the Cartoon. (A24)

In dictum, the Court then stated:

> "In addition there is ample circumstantial evidence that the publication in the June 1979 issue of Hustler was a continuation of a policy previously established by defendant Flynt when he was president, as well as publisher and chairman of the board of Hustler". (A24)

Thus, the "circumstantial evidence" referred to the fact that:

> "the June 1979 issue of Hustler was a continuation of a policy previously established by ... Flynt."

Obviously, Hustler's continuation of a policy (after Flynt was shot and incapacitated) is not probative of whether Flynt had "actual malice" with reference to a Cartoon he had no knowledge of prior to publication, merely because he retained the titles of "Publisher" of Hustler and Chairman of the Board. Thus, contrary to Guccione's assertion at p.7 of his brief, the Ohio Appellate Court did not state that there was "circumstantial evidence" to warrant a finding of "actual malice" by Flynt.

Guccione, at pp. 7-8 of his brief raises a factual dispute about alleged trial evidence that Flynt had actual involvement with the June 1979 issue of Hustler. This alleged evidence was weighed and rejected by the Ohio Appellate Court when it held that no reasonable jury could have concluded that Flynt had any prior knowledge of, or involvement in, the June 1979 issue of Hustler. (A23-24)

Guccione then argues that this finding:

> " ... cannot raise a constitutional question ... where the jury was properly instructed and the factual question of malice resolved against Flynt ... the trial court (n)ever suggested that Flynt's liability rested upon any notion of strict liability."

First, as set forth hereinafter, the jury was not properly instructed on "actual malice". Second, the Ohio Appellate Court, resolved the issue of Flynt's non-involvement in the Cartoon in Flynt's favor. Third, while the trial court may not have held Flynt strictly liable, the Ohio Appellate Court's ruling did.

B. The Jury Instruction was Based Upon a Misreading and Misapplication of St. Amant

Guccione contends at p. 11 of his brief that "...it surely was not error to give the St. Amant instruction..." This assertion is based on a misreading of St. Amant v. Thompson, 390 U.S. 727 (1968)[1]. The trial Court's St. Amant charge would have been proper as to Flynt, only if it had first been proven that Flynt (i) knew of the existence of the Cartoon prior to its publication, (ii) intended it to be a serious assertion of fact, and (iii) had serious doubts about its truthfulness.

Guccione states on pp. 11-12 of his Brief that Petitioners did not object to the trial court's erroneous St. Amant charge. First, Guccione's attorney knows that Petitioners did object to the Court's St. Amant charge in a thorough discussion

1/ In St. Amant the defendant, unlike Flynt, had been personally aware of the item complained of before it was published. The defendant in St. Amant was contending only that he believed the published language to be true.

of that charge conducted in chambers between counsel and the court. Second, after such discusson Petitioners objected on the record:

> "Mr. Brownfield: Page 21, objection to the entire page, entire charge given there because it is wrong, St. Amant versus Thompson, that is wrong." (A109)

Thus, the Ohio Appellate Court erred by stating that Petitioners had not objected to the "St. Amant" charge. (A28). Therefore, Petitioners seek to correct that error.

C. A Jury Instruction that Parody or Satire can be Libelous Merely Because It Is "False and Fabricated", or "The Product of the Defendant's Imagination" is Unconstitutional.

Guccione's Brief notes on page 12 that Petitioners "... made no effort to show the truth of the matters asserted ..." Of course, Petitioners never argued that the Cartoon was truthful because it was intended fiction as parody and satire. As set forth on pp. 8-11 of Petitioners' main brief, the Cartoon was not meant to be, and could not be reasonably interpreted as, a serious assertion of fact. The St. Amant instruc-

tion erroneously directed the jury to conclude that Petitioners had "actual malice" merely because the intended fictional Cartoon as parody or satire was "false and fabricated" or a "product of the defendant's imagination".[2/] This error was compounded by the failure to permit Petitioners to present expert testimony on parody and satire. (A24)

Guccione at p. 14 of his brief states:

> "... Ohio ... has specifically rejected the defense of humor to a libel action."

Guccione then, at pp. 14-15, cites Ohio case authority which holds that a media defendant

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2/ Moreover, the "actual malice" standard should not have been applied to this case of a satire or parody in the form of intended fiction, unless it had first been proven by clear and convincing evidence that the Petitioners' intended the Cartoon to be a serious assertion of fact. "Ridicule ... always involves falsity. To apply the Sullivan tests--... premised on the speaker's regard for the truthfulness of his statement -- to ridicule is plainly ludicrous." Silver, "Libel, The Higher Truths of Art and the First Amendment," 126 U. Pa. L. Rev. 1065, 1094 (1978).

is liable for a statement about an all purpose public figure, even though it:

> "can be regarded as made in jest ... unless it is perfectly manifest from the language employed, that it could in no respect be regarded as an attack upon the reputation ... of the person to whom it related." (Emphasis added.)

This rule not only eliminates the requirement of actual malice proven by clear and convincing evidence, but shifts that burden to media defendants, such as Petitioners.

Under this rule, parody and satire are not possible without liability for defamation because in some respect every parody, satire or criticism of an all purpose public figure can be regarded "as an attack upon the reputation" of such person. Intended fiction is not libelous if it is not intended to be a serious assertion of fact.[3/]

3/ Arno v. Stewart, 245 C.A.2d 955, 54 Cal. Rptr. 392 (App. 1st Dept. 1966); Blake v. Hearst Publications, 75 C.A.2d 6, 170 P.2d 100 (App. 2d Dist. 1946); Lamberti v. Sun Printing & Pub. Assn., 111 App. Div. 437, 97 N.Y.S. 694 (2d Dept. 1906); Meyers v. Boston Magazine, 403 N.E. 2d 376 (Mass. 1979); Univ. of Notre Dame v. Twentieth Century Fox, 22 A.D.2d 452, 256 N.Y.S.2d 301 (1st Dept.).

The cases cited by Guccione at p. 15 concerning fiction dealt with whether the fictional works were intended to make representations of fact about a plaintiff who was thinly disguised in the fictional work. If there are no representations of fact, as in this case, there can be no libel.[4/]

D. A Jury Finding of Liability Violates Due Process When it Results From Passion and Prejudice.

The Ohio Appellate Court found that:

> " ... (the) enormous excessiveness of the ($38,000,000) jury verdict (against Petitioners), which was 13 times the amount the trial court found to be reasonable ... coupled with the repeated appeals [by Guccione] to the passion and prejudice (of the jury) can lead to no other conclusion but that the verdict of the jury was one influenced by passion and prejudice..." (A40-41).

The passion and prejudice of the jury was so great[5/] that it tried to put Petitioners

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4/ "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact" Letter Carriers v. Austin, 418 U.S. 264 at 284 (1974).

5/ The Ohio Appellate Court also found "... that the jury verdicts are hopelessly inconsistent and defective ..." (A31) and that the jury had "... a misunderstanding ... as to their functions." (A34) (See also A32-33.)

"out of business ... by awarding an amount of ... damages so great that they could no longer publish" (A40-41).

The following specific factors found by the Ohio Appellate Court to have appealed to the passion and prejudice of the jury inherently must have[6/] contaminated the jury's verdict on liability (i.e., the issue of whether Petitioners intended the Cartoon to be parody and satire, and not a serious assertion of fact).

> "(1) evidence of apparent libel ... of persons other than plaintiff; (2) the efforts during cross-examination of defendant Flynt to depict him as an evil person; ... (4) outbursts of plaintiff Guccione during cross-examination tending to appeal to the passion and prejudice of the jury;... and (7) the closing argument of plaintiff's counsel" (A38)

Guccione wrongly asserts at pp. 16-17 of his Brief that an excessive jury verdict

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6/ There is proof that the extreme prejudice and passion of the jury actually contaminated the verdict of liability, since the jury found that Flynt was liable for damages for libel and invasion of privacy, even though he had no actual knowledge of, or involvement in, the publication of the Cartoon, and despite the instruction to the jury that such actual knowledge is an element of the latter tort.

caused by passion and prejudice does not require a new trial, and that a remittitur is proper in such a case. The Federal cases cited by Guccione do not support this assertion because those verdicts had not been influenced by passion and prejudice.[7/]

Guccione incorrectly asserts at p. 16 of his brief that the issue:

> "... of liability in this case was distinct from the issue of damages..."

Since Guccione is an all-purpose public figure, actual malice for <u>both liability and punitive damages</u> must be proven against the

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7/ In <u>Curtis Publishing Co. v. Butts</u>, 351 F.2d 702 (5th Cir. 1965), the Court noted that the excessive award of damages was <u>not</u> based on passion or prejudice. In <u>Edwards v. Sears, Roebuck & Co.</u>, 512 F.2d 276 (5th Cir. 1975), the Court noted "the distinction between verdicts excessive in an amount which may properly be reduced by remittitur, and those <u>resulting from passion and prejudice, which may not be so corrected.</u>" (Emphasis added.) In fact, the <u>Edwards</u> court reversed the lower court's decision to grant remittitur and remanded for a new trial on both liability and damages stating: "...the award of damages (was)... grossly excessive...,

media defendant Petitioners. The inseparability of the question of liability from that of damages is set forth on pp. 61-64 of Petitioners' main brief. Instead of responding to those pages, Guccione incorrectly asserts on p. 16 that "... there was overwhelming evidence to uphold the finding of liability". Guccione is wrong! As to Flynt, the Ohio Appellate Court held that he had no prior knowledge of, or involvement

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7/ Counsel's final argument to the jury was clearly prejudicial..., the jury's verdict was swayed by passion and prejudice, and the jury failed to respond to the court's instructions...these factors indicate that the issues of liability and damages were both improperly influenced. ...a new trial is mandated." In Dorin v. Equitable Life Assurance Society, 382 F.2d 73, 77 (7th Cir. 1967), the Court stated:
"If a verdict is a result of appeals to passion and prejudice, the trial court must unconditionally order a new trial and cannot give the plaintiff an option to accept a lesser amount."
In fact, the Ohio Appellate Court in this case recognized the above rule stating: "...where a verdict is so excessive as to have been given under the influence of passion or prejudice, it must be set aside and a new trial granted, a remittitur being inappropriate..." (A 36).

in, the publication of the Cartoon. As to Petitioner Hustler, the only witness on the issue of why Hustler published the Cartoon testified that his intent and that of Hustler in publishing the Cartoon, was to parody and satirize Guccione's open sexual conduct and his "Vaseline lens" techniques.

E. There is a Final Judgment Below for the Purpose of Granting Certiorari

The applicable doctrine of finality is set forth in Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975),[8/] which established four categories of cases in which this Court will assume jurisdiction despite the fact that there may be further proceedings in state courts below.

8/ Cox, which also involved First Amendment issues of freedom of the press, is very similar to this case. The procedural postures are almost identical. In fact, in Cox the issue of liability had not even been determined by the trial court! Despite the lack of any final judgment at all on the issue of liability in Cox, this Court accepted the appeal. In this case there is a final judgment of the highest state court on liability.

This case falls into three Cox categories. The first category,

> "those cases in which there are ... proceedings -- even entire trials -- yet to occur in the state courts, but where ... the federal issue is conclusive or the outcome of further proceedings preordained", 420 U.S. at 479,

is applicable since the Ohio courts have rejected Petitioners' constitutional defenses and conclusively determined the issue of liability. Thus, there is no possibility of a judgment for Petitioners.

This case also falls into the second Cox category, cases

> "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings," 420 U.S. at 480.

The constitutional issues raised by Petitioners will survive regardless of the amount of damages found by the trial court.

> "Nothing that could happen in the course of the [trial on damages] short of settlement of the case, would foreclose or make unnecessary decision of the federal questions." Id.

Finally, the fourth Cox category applies:

> "where reversal of the state court would be preclusive of any further litigation on the relevant cause of action...if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-483.

The erroneous rulings by the Ohio Appellate Court on the First Amendment and due process issues presented by Petitioners constitute final decisions on those issues. The Ohio state courts will not again consider these issues if this Court declines to assume jurisdiction and the case is remanded to the trial court, while reversal of the Ohio courts on these issues would preclude further litigation against the Petitioners. Since the Ohio Appellate Court held that Flynt had no advance knowledge of, or involvement in, the publication of the Cartoon, it is clear that Guccione would be unable to prevail against Flynt on the issue of liability if this Court answers either of the first two Questions Presented in

Petitioners' favor. Guccione also would be unable to prevail against either Petitioner if this Court answers the third Question Presented in Petitioners' favor since the Cartoon was intended to be, and was, constitutionally protected speech in the form of parody and satire. A refusal to review the Ohio Appellate Court's decision will clearly erode important federal policies with respect to freedom of the press and due process of law.[9/] For purposes of granting certiorari, the judgment below is final since further state court proceedings cannot remove the federal constitutional issues in the Questions Presented.[10/]

9/ As stated in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247 n. 6 (1974): "Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, ... an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture ... could only further harm the operation of a free press."

10/ New York v. Cathedral Academy, 434 U.S. 125, 128 n. 4 (1977); Brady v. Maryland, 373 U.S. 83 (1963).

Without immediate review by this Court, there will be a significant "chilling effect" since Petitioners (and other media defendants) will be subject to (1) very substantial and unnecessary legal expenses, and (2) a substantial money judgment, despite the clear violations of their rights under the First and Fourteenth Amendments.

Respectfully submitted,

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